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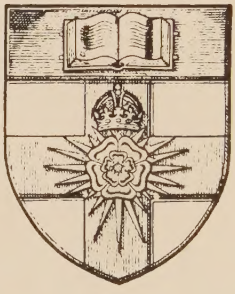

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IN

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE SUPREME COURT

AND IN

THE COURT OF CRIMINAL APPEAL

IN

THE IRISH FREE STATE.

EDITED BY

ALBERT D. BOLTON,

BARRISTER-AT-LAW.

1925.

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Supreme Court.

Hugh Kennedy, *Chief Justice.*
The Right Hon. Charles A. O'Connor.
Gerald FitzGibbon.
James Augustine Murnaghan.

High Court.

Timothy Sullivan, *President.*
James Creed Meredith.
The Right Hon. Thomas Lopdell O'Shaughnessy.
William John Johnston.
The Hon. William E. Wylie.
James Augustine Murnaghan.
Henry Hanna.

Attorney-General.

John O'Byrne K.C.

[These Reports will be cited as follows :—[1925] 2 I. R.]

REPORTERS.

Supreme Court of Justice and Court of Criminal Appeal,	C. Lehane, . . . Hugh J. M'Cann, R. St. J. Chadwick, R. L. Sandes, . .	Barristers-at-Law.
High Court of Justice,	R. Rice, ... T. C. Tobias, . . . Hector Hughes, G. Gavan Duffy,	Barristers-at-Law.

CORRIGENDUM.

Page 9, line 10 from foot of page, for "*and*" read "*not*".

MEMORANDUM.

On the 30th April, 1925, Right Hon. Charles A. O'Connor (formerly Master of the Rolls in Ireland) resigned his office as Judge of the Supreme Court of Justice of the Irish Free State.

On the 1st May, 1925, Mr. Justice Murnaghan was appointed a Judge of the Supreme Court of Justice of the Irish Free State.

On the 1st May, 1925, Mr. Serjeant Hanna K.C. was appointed a Judge of the High Court of Justice of the Irish Free State.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Attorney-General (Millard) *v.* Madigan 144

B.

Bank of Ireland, Revenue Commissioners *v.* ... 90
Barton *v.* Harten 37
Bergin, O'Connor & Co., Howard *v.* ... 110, 118
Bolger *v.* Daly 42
Butler, Lynam *v.* ... 82, 231

C.

Cahir *v.* Minister for Finance 150
Circuit Judge for Cork, R. (Alexander) *v.* ... 165, 175
Commissioners of Inland Revenue *v.* Bank of Ireland 90
Connolly *v.* Minister for Finance 205
Connor *v.* O'Brien ... 24

D.

Daly, Bolger *v.* 42
Doherty, *In re* 246

F.

Furey, Hodgens *v.* ... 69

H.

PAGE

Harten, Barton *v.* ... 37
Hodgens *v.* Furey ... 69
Horgan, Macauley *v.* ... 1
Howard *v.* Bergin, O'Connor & Co. ... 110, 118

K.

Keane, Phillips *v.* ... 48
Kelly and Gorman, The State *v.* 73
Kennedy *v.* Minister for Finance 195
Kerry Co. Council, Lansdowne (Marquis of) *v.* ... 87

L.

Lansdowne (Marquis of) *v.* Kerry Co. Council ... 87
Lewin *v.* Minister for Finance 240
Limerick Co. Council, Lynch *v.* 61
Limerick Co. Council, Phillips *v.* 139
Logan *v.* O'Donnell ... 211
Lynam *v.* Butler 82, 231
Lynch *v.* Limerick Co. Council 61

M.

PAGE

Macauley *v.* Horgan ... 1
M'Carthy, Rinn *v.* ... 157
M'Collum *v.* Tease ... 33
M'Mullen, The State *v.* ... 9
M'Namara, Monahan *v.* ... 32
Madigan, Attorney-General (Millard) *v.* 144
Minister for Finance, Cahir *v.* 150
Minister for Finance, Connolly *v.* 205
Minister for Finance, Kennedy *v.* 195
Minister for Finance, Lewin *v.* 240
Moloney, Salmon *v.* ... 35
Monahan *v.* M'Namara ... 32

O.

O'Brien, Connor *v.* ... 24
O'Donnell, Logan *v.* ... 211

P.

Phillips *v.* Keane 48
Phillips *v.* Limerick Co. Council 139

R.

PAGE

R. (Alexander) *v.* Circuit Judge for Cork ... 165, 175
Revenue Commissioners *v.* Bank of Ireland 90
Rinn *v.* M'Carthy ... 157

S.

Salmon *v.* Molony ... 35
State, The, Kelly and Gorman *v.* 73
State, The, M'Mullen *v.* ... 9
Stewart, *In re* 51

T.

Tease, M'Collum *v.* ... 33
The State *v.* Kelly and Gorman 73
The State *v.* M'Mullen ... 9

TABLE OF CASES CITED.

A.

PAGE

Aberdeen Glen Line Steamship Co. *v.* Macklin; s.s. "Gairloch" 242
Abrath *v.* North-Eastern Railway Co. 45
Admiralty Commissioners *v.* s.s. "Volute" 226
Andrews *v.* Astley 49
Ashbury *v.* Ellis 179
Attorney-General *v.* Lamplough 59
Attorney-General for Canada *v.* Cain and Gilhula ... 178

B.

Bank of Australasia *v.* Nias ... 179
Banks *v.* Hollingsworth ... 26
Becquet *v.* MacCarthy ... 178
Belfast Poor Law Guardians *v.* Belfast Corporation ... 141
Bloxham *v.* Saunders ... 4
Bond *v.* Kent 53
Bridger *v.* Whitehead ... 45
British Columbia Electric Railway Co. *v.* Loach 213, 217, 220, [223, 228
British South Africa Co. *v.* Companhia de Moçambique 178, 179
Butterly *v.* Drogheda Corporation 212

C.

Cahir *v.* Minister for Finance 197, 203
Card *v.* Case 115
Capper *v.* Spottiswoode 53, 58, 60
"City of Agra, The" ... 178
Clemens Horst Co. *v.* Biddell Bros. 4
Colquhoun *v.* Brooks ... 179
Colonial Sugar Refining Co. *v.* Irving 36
Congested Districts Board *v.* Mayo County Council 89, 154, 197, [200, 201, 202, 203, 206, 207, [208, 209

PAGE

Connor *v.* O'Brien 33
Conway *v.* Wade 41
Cooper *v.* General Accident Assurance Co. 242
Cox *v.* Burbidge 113, 115, 116, 117, [118, 119, 125, 131, 132
Cunningham *v.* Whelan 116, 119

D.

Davidsson *v.* Hill 191
Delany *v.* G. W. Milling Co. ... 190
Devlin *v.* Belfast Corporation 217, 225
Doe, *dem.*; Bridger *v.* Whitehead 45
Dougal *v.* M'Carthy 158, 159
Doyle *v.* Kinahan 227
Driscoll *v.* Riordan ... 159, 160, 164

E.

Earl *v.* Neill 164
Eley *v.* Lytle 153
Elliott, *In re* 206

F.

Firebrace *v.* Firebrace ... 178
Fletcher *v.* Rylands 117
Fraser *v.* Pate ... 115, 119
Friedson *v.* Glyn-Thomas ... 49

G.

Gaffney *v.* Dublin United Tramways Co. ... 213, 216, 218
Gaffney *v.* Fetherstonhaugh ... 233
"Gairloch, The"; Aberdeen Glen Line Steamship Co. *v.* Macken 242
Gardner *v.* Lucas 53, 56
Gardner *v.* Mansbridge ... 153
Gayford *v.* Chowler 154
Gayler & Pope, Ltd., *v.* Davies & Son 118, 119

H.

PAGE
Hadwell *v.* Righton 119
"Halley, The" 178
Harding *v.* Commissioners of Land Tax 179
Hatchell *v.* Russell 84, 85
Heath's Garage, Limited, *v.* Hodges 117, 118, 119, 124, 125, 132
Hussey *v.* Horne-Payne ... 3

J.

Jones *v.* Lee 117
Jones *v.* Owen 116

K.

Kay *v.* Goodwin 52, 59
Kelly *v.* Wade ... 117, 119
Kenmare (Lord) *v.* Kerry County Council 206
Kennedy *v.* Minister for Finance 208
Kerr *v.* Bryde 44
Kinloch's Case 19
Kirby *v.* Kerry County Council [202, 203
Krzus *v.* Crow's Nest Pass Coal Co., Ltd. ... 179, 190

L.

Lansdowne (Lord) *v.* Kerry County Council 154
——— *v.* ——— 207, 208
Lavery *v.* Purcell 207
Laws *v.* Eltringham 153, 198
Lemm *v.* Mitchell 52
Leyburn *v.* Armagh County Council (No. 2) 89, 154, 200, 202, 206
Lloyd *v.* Guibert 178
Lucas and Chesterfield Gas and Water Board, *In re* ... 244
Lynch *v.* Limerick County Council 184, 189

M.

M'Cutcheon *v.* Londonderry County Council 89
M'Cusker *v.* Smith 40
M'Dowell *v.* Dublin Corporation 89, [198, 200, 202, 206
Mackreth *v.* Symmons ... 53
Mackalley's Case 13, 21
Macleod *v.* Attorney-General for New South Wales 172, 178, [179, 192, 193
Manton *v.* Brocklebank 115, 117, [119, 124, 125
Marshall *v.* Green 207
Matthews *v.* Cork County Council 141
May *v.* Burdett 117
Meredith *v.* Kerry County Council 154
Michael *v.* Phillips 44
Miles *v.* Gorton 4
Monaghan *v.* Hinds 239
Mortensen *v.* Peters ... 179
Moyle *v.* Meath County Council 206

N.

National Bank *v.* Diffely ... 53
Neenan *v.* Hosford ... 216, 228
Nelson *v.* Headfort 233
Niboyet *v.* Niboyet 179
Noblett *v.* Leitrim County Council 201, 203, 206
North *v.* Smith ... 116, 119

O.

O'Neill *v.* Belfast County Council 154

P.

Panagotis *v.* Owners of s.s. "Pontiac" 178
Peninsular and Oriental Steam Navigation Co. *v.* Kingston 179
Peyton *v.* Gilmartin ... 239
Pordage *v.* Cole 4

R.

R. *v.* Beecham 77
— *v.* Brownhill 77
— *v.* Bundy 76
— (Armstrong) *v.* County Court Judge of Wicklow 172, 184, 185, [189, 191
— *v.* Dinnick 13
— *v.* Farnborough 13
— *v.* Fletcher 13, 23
— *v.* Foley 197
— *v.* Foy 13, 23
— *v.* French 13, 23
— *v.* Gibson 76
— *v.* Hewitt 154
— *v.* Hill 13
— *v.* Hopper 13
— *v.* M'Mahon 13, 19
— *v.* Maclean 77
— *v.* Maloney 13, 23
— *v.* Margulas 76
— *v.* Marriott 76
— *v.* Middlesex JJ. 153
— *v.* Millichamp 76
— *v.* Otto Monsted, Ltd. ... 153

PAGE

R. v. Parker 77
— v. Parks 13
— (Coleman) v. Pettit ... 179
— v. Phillis 13, 23
— v. Porter ... 13, 20, 22
— v. Owen ... 169, 182, 188
— v. Robinson 13, 23
— v. Saunders 76
— v. Scholey 13
— v. Stock 153
— v. Tooley 13
— v. Totty 77
— v. Townley 197
— v. Wainwright 76, 80
— v. Wilkins 76, 80
— v. Williams ... 154, 207
— v. Wink 76, 80
— v. Yeadon and Birch ... 13
Radley v. London and North-Western Railway Co. 212, 226
Rattray v. Cork & Macroom Railway Co. 228
Reddish, *Ex parte* 53
Reynolds v. Thomas Tilling, Ltd. 212
Ricketts v. Colquhoun ... 49
Right v. Darby ... 158, 159
Roulston, *In re* 53
Rousillon v. Rousillon 172, 178
Russell & Co., Ltd., v. Cayzer, Irvine, & Co., Ltd. ... 178
Russell (Earl), Trial of ... 193
Ryan v. Tipperary County Council (N.R.) 64
Ryan v. Tipperary County Council (S.R.) 63

S.

Salter v. Lusk 45
Schmit v. Christy 44
Scorell v. Boxall 207
Scott v. Dublin and Wicklow Railway 213, 217, 223, 224
Scott v. Shepherd 119, 127, 130, 137

PAGE

Sidney v. North-Eastern Railway Co. 244
Sirdar Gurdyal Singh v. Rajah of Faridkote ... 172, 178
Smith v. Surman 207
Spaight v. Tedcastle ... 226
Surtees v. Ellison 52, 59

T.

Tillett v. Ward 119
"The City of Agra" ... 178
"The Halley" 178
"The Wild Ranger" ... 179
"The Winkfield" ... 207
Trial of Earl Russell ... 193
Turner v. Coates' 116, 119, 124, 125
Turner v. Kingsbury Collieries, Ltd. 180, 186
Tyler & Sons v. Cork County Council 89, 201, 202, 203, 206

V.

Vaughan v. Cork and Youghal Railway 228
Von Stentz v. Comyn ... 153

W.

Wakefield and District Light Railway v. Wakefield Corporation 147
Wakelin v. London and South-Western Railway Co. ... 230
Walsh v. Mayo County Council 141
Weiser v. Segar 213
Wertheim v. Chicoutimi Pulp Co. 8
Winsor v. R. 13, 19
"Wild Ranger, The" ... 179
"Winkfield, The" 207
Worthington v. Tipperary County Council 207

Y.

Yelverton v. Yelverton ... 178

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

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AND BY

THE COURT OF CRIMINAL APPEAL

IN

THE IRISH FREE STATE.

1925.

HENRY JAMES MACAULEY AND CECIL JAMES CULLEN, TRADING AS THE SMITHFIELD WOOL COMPANY, PLAINTIFFS, *v.* T. J. HORGAN, DEFENDANT (1).

Sullivan P.
1924.
Nov. 7, 21

Sale of Goods—Contract contained in telegrams—No time fixed for delivery —Delivery and payment concurrent conditions — Seller wrongfully refusing to deliver goods — Measure of damages — Difference between contract price and market price at time of refusal to deliver—Absence of available market at place of delivery—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *sects.* 28, 51.

In October, 1923, defendant wired to plaintiffs, who were wool merchants in Dublin, offering them wool, and plaintiffs wired in reply. Further telegrams passed between the parties, which the Court held constituted a binding contract for the sale of the wool at the price mentioned—F.O.R. at Cahirciveen, Co. Kerry. No time was fixed for delivery. The defendant not having delivered the wool, plaintiffs sued for damages. Defendant contended that under sect. 28 of the Sale of Goods Act, 1893, payment and delivery were concurrent conditions, and that as the plaintiffs neither sent a cheque nor tendered cash for the wool, they could not allege a failure to deliver, or that there was a breach of contract.

Held, that a reasonable time for delivery had elapsed by December 5th, 1923; and, as the wool was not delivered, the defendant must be deemed to have broken his contract. Accordingly, as the defendant was not ready and willing to deliver the wool, though the plaintiffs were ready and willing to pay for it, defendant's contention was unsustainable.

Sect. 51 of the Sale of Goods Act, 1893, deals with damages for non-delivery, and sub-s. 3 provides: "Where there is an available market for the goods in question, the measure of damages is prima facie to be ascer-

(1) Before SULLIVAN J. (President of the High Court).

Sullivan P. 1924.

MACAULEY v. HORGAN.

tained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The price of wool rose during the months of November and December, 1923. The evidence dealt with the Dublin prices only.

Held, that as there was no evidence of an available market for the wool at Cahirciveen, where delivery was contracted for, yet, having regard to the previous dealings between the parties and the inter-communication between Cahirciveen and Dublin, the market price at Cahirciveen might, for the purposes of the measure of damages, be taken to be the market price at Dublin, less the cost of carriage. Accordingly the damages were fixed at the difference between the contract price and the market price of the wool in Dublin, less the cost of carriage from Cahirciveen to Dublin, at the time of the defendant's refusal to deliver.

Wertheim v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, applied.

TRIAL OF ACTION.

The plaintiffs, who were wool merchants of Smithfield, in the City of Dublin, claimed damages for non-delivery of wool by the defendant, who was a merchant carrying on business at West Main Street, Cahirciveen, in the County of Kerry. Plaintiffs' statement of claim set out that it was agreed by and between the plaintiffs and defendant that the defendant should sell to the plaintiffs five tons of greasy wool at the rate of 7½d. per lb. and five tons of washed wool at the rate of 9d. per lb., to be delivered by the defendant to the plaintiffs, and to be paid for on delivery; and that the defendant did not deliver the wool to the plaintiffs, whereby the plaintiffs had been deprived of the profits which would have accrued to them from the delivery of the same. And they claimed £500 damages. The defendant in his defence denied the making of any agreement, but, admitting for the purposes of this portion of his defence that he agreed to sell and deliver wool to the plaintiffs, he said it was a term of the agreement that the plaintiffs should send down a man to his premises at Cahirciveen to sort, weigh, and pack the wool, and pay for the same before delivery. That the plaintiffs neglected and refused to send down a man to sort and pack the wool, or to pay for the same in pursuance of the said agreement. That by reason of the plaintiffs so neglecting and refusing he (the defendant) said that the plaintiffs put an end to the agreement, and that he was accordingly absolved from all liabilities. Alternatively, the defendant said that by reason of the plaintiffs' neglect and refusal to send down a man to his premises to sort and pack the wool the plaintiffs treated the contract as rescinded, and, therefore, led the defendant to believe that the contract was rescinded. He denied that the plaintiffs had suffered any damage.

The contract, the plaintiffs contended, was contained in certain telegrams which passed between the plaintiffs and defendant. On the 25th October, 1923, the defendant telegraphed to the plaintiffs offering them five tons each of greasy wool at 7½d.

per lb. and five tons of washed wool at 9d. per lb., F.O.R. at Cahirciveen, County Kerry. On the same day the plaintiffs telegraphed to the defendant to post samples of the wool and to hold bulk for their approval. Defendant telegraphed in reply the next day stating that the quality was the same as last year, that others were offering, and the matter was urgent, and that samples had been posted. On the same day the plaintiffs telegraphed in reply: "Wire received. We accept five tons each greasy, washed, 7½ and 9. Wire confirmation." And on the same day the defendant replied: "Will accept. Writing. Post confirmation." On the same day also the defendant wrote to the plaintiffs enclosing samples of the wool, and stating that, if the plaintiffs purchased, the defendant thought it would be more satisfactory for each party if the plaintiffs sent down a man and had the wool sorted at his premises at Cahirciveen, as he had had a large store built, and there was plenty of room to work. He then quoted the prices of the wool, and asked the plaintiffs to wire confirmation. These telegrams and this letter together with the other material letters are fully set out in the judgment of Sullivan P.

Swayne K.C. and *C. Murphy*, for the plaintiffs:—

The contract is contained in the telegrams which passed between the parties. By that contract the defendant agreed to sell to the plaintiffs five tons of greasy wool at the rate of 7½d. per lb. and five tons of washed wool at the rate of 9d. per lb., to be delivered to the plaintiffs, and to be paid for on delivery. Owing to the failure of the defendant to deliver the wool the plaintiffs have been deprived of the profits which would have accrued to them from the delivery of the wool, and the defendant is, therefore, liable.

F. FitzGibbon K.C. and *R. L. Tyrrell*, for the defendant:—

There is no completed contract; the telegrams and letters sent by the parties do not constitute such: *Hussey* v. *Horne-Payne* (1). Alternatively, if there be a completed contract, it is comprised in the telegrams and also in the letter from the defendant to the plaintiffs dated 26th October, 1923, as, where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration: *Hussey* v. *Horne-Payne* (1). If the contract be contained in the letter of 26th October as well as in the telegrams, that letter contained the express condition that the plaintiffs were to send a man down to Cahirciveen to sort and take delivery of the wool at Cahirciveen.

If there were a completed contract, and whether one containing the condition to send a man down or not, the place of

(1) 4 A.C. 311.

Sullivan P. 1924.

MACAULEY v. HORGAN.

delivery was either the defendant's stores or at Cahirciveen. And in either case, the contract being silent as to time of delivery and time of payment, payment and delivery were concurrent conditions: *Pordage* v. *Cole* (1); Sale of Goods Act, 1893, sect. 28; Benjamin on Sale, 6th ed., pp. 639, 683, 782; *Bloxham* v. *Saunders* (2); *Clemens Horst Co.* v. *Biddell Brothers* (3).

The vendor is not bound to part with his goods until he is paid: *Miles* v. *Gorton* (4); Benjamin on Sale, 6th ed., p. 957, unless he has agreed to a credit transaction. There is no evidence here that the dealing was on credit. The contract is silent on the point. An agreement to give credit can only be implied from circumstances such as trade custom or the previous course of dealing between the parties, which compel the implication that the parties so intended. There is no evidence of any such circumstances here.

The measure of damages is not the difference between the contract price and the price of wool in January, when plaintiffs served their peremptory notice. If defendant broke his contract, he did so when he failed to deliver within a reasonable time, and at latest when he resold: Sale of Goods Act, 1893, sect. 51. In any case, the difference between the contract price F.O.R. at Cahirciveen and the price at the date of breach—also in Cahirciveen, not in Dublin—is the measure. There is no evidence here that the price in Cahirciveen had moved up during this period.

Cur. adv. vult.

Nov. 21.

SULLIVAN P.:—

This case stood over for judgment, as I wished to consider some of the points arising, though on the main question in the case I did not entertain much doubt.

The first point in dispute is as to the existence of the contract sued on—whether it is contained in certain telegrams sent on 25th and 26th October, 1923, and in a letter dated 26th October, 1923, sent by the defendant to the plaintiffs. The defendant denies the alleged contract, and contends that in fact there was no concluded contract between him and the plaintiffs; and I deal with this contention first.

The telegram sent by the defendant to the plaintiffs on 25th October offered them five tons of greasy wool at 7½d. per lb. and five tons of washed wool at 9d. per lb., F.O.R. at Cahirciveen. The telegram is as follows:—"Five tons each greasy, washed, seven half and nine for Cahirciveen," and the defendant prepaid a reply. On the same day the plaintiffs wired to the defendant in reply:—"Post samples immediately, hold bulk, our approval." On 26th October defendant wired: "Quality same as last year, others offering, samples posted. Urgent." And on the same date plaintiffs wired reply:—"Wire received. We accept five

(1) 1 Wms. Saund. 319*l*.
(2) 4 B. & C. 941.
(3) [1912] A. C. 18.
(4) 2 Cr. & M. 504.

tons each greasy, washed, 7½ and 9. Wire confirmation." On the same date (26th October) defendant replied:—"Will accept. Writing. Post confirmation." Now, on these telegrams I hold that there was on 26th October a completed contract for the sale of five tons of greasy wool at 7½d. per lb., and of five tons of washed wool at 9d. per lb., F.O.R. at Cahirciveen. Mr. FitzGibbon, for the defendant, argues that a letter written by the defendant to the plaintiffs on 26th October is to be read into and forms part of the contract. The letter is as follows:—

> DEAR SIRS,
>
> "I enclose samples of greasy and washed wool. It is all coarse Kerry mixed, same as what you got last year, when you were doing business at Haymarket. I have about five tons each. If you purchase, I think it would be more satisfactory for each of us if you send a man down and have it sorted here, as I have a large store built and plenty of room to work. Price, 7½d. greasy, and washed 9d. A reply by return will oblige."

Now, it seems to me that when defendant sent that letter he cannot have received the wire from the plaintiffs of the same date: "We accept five tons each greasy, washed, 7½ and 9. Wire confirmation"; or, if he had, he was apparently under a misapprehension as to the effect of it.

There was, then, as I hold, a concluded contract on October 26th, and, even assuming that the letter of October 26th is to be taken as forming part of the contract, I hold that it did not import any new term into the contract. The defendant says: "If you purchase, I think it would be more satisfactory for each of us if you send a man down and have it"—that is, the wool—"sorted here, as I have a large store built and plenty of room to work." That suggestion as to sorting was never agreed to by the plaintiffs. It was no more than a suggestion—a suggestion made by one party and never concurred in by the other. The prices, then, were fixed for the two kinds of wool, and the total amount was £770 for the ten tons.

But there was no time fixed for delivery. As no time was fixed for delivery, it was the duty of the seller to deliver the goods free on rail within a reasonable time. This brings me to the second argument of Mr. FitzGibbon, namely, that delivery and payment are concurrent conditions, and that, as the plaintiffs neither sent a cheque nor tendered cash for the wool, they cannot allege a failure to deliver, or that there was a breach of contract. I cannot accept this view. It was the duty of plaintiffs to be ready and willing to pay for the goods; and I am satisfied that the plaintiffs were in fact ready and willing to pay, and I am also equally satisfied that the defendant was not ready and willing to put on rail and deliver the wool which had been ordered. In fact, the wool ordered was never despatched. I accordingly hold that defendant broke his contract.

Sullivan P. 1924. MACAULEY v. HORGAN.

This brings me to the third matter argued, and which is one that caused me some difficulty, namely, the question as on what date the damages should be ascertained. I have already held that the contract was complete on 26th October. After that date the next communication was a letter of 5th November from the plaintiffs to the defendant, which is as follows:—

> "DEAR SIR,
>
> "We have pleasure to attach herewith copy of our telegram No. 87 of the 26th ult., in which we accept five tons each greasy and washed at 7½d. and 9d. respectively, quality and conditions same as last year. Please send on to Dublin and advise us despatch."

On the 8th November the defendant wrote in reply: "Will send on some wool the end of the week." From that date on, there was no communication of any kind from the defendant, and the wool was never forwarded to the plaintiffs. On 5th December the plaintiffs wrote as follows:—

> "DEAR SIR,
>
> "Kindly let us hear by return when we may expect delivery of the ten tons of wool bought October 26th, as our clients are pressing us for delivery, and threaten to buy against us and sue us for non-delivery. On the 8th November you wrote stating you were forwarding some wool that week, and we have enquired at the shipping and railway companies, without result. In your letter of October 26th you suggested our sending a man down to pack, and we think perhaps this would be best, as our clients will not delay any longer, and we must get the wool forwarded to them. Kindly let us have a reply by return. Wire if possible. Awaiting your reply."

The plaintiffs have satisfied me that no reply was sent to that letter. The defendant alleges that he wrote a reply on December 7th, but he has no copy of the letter, and there is no evidence before me that this letter, if written, was ever in fact posted. The defendant gave some vague evidence as to posting the letter; he said that he did not post it himself, but that he gave it to a clerk to post. But the evidence is not sufficient for me to hold that any such reply was posted to the plaintiffs' letter of December 5th, and I hold that no such reply was, in fact, sent.

In their letter of 5th December the plaintiffs say that their clients were pressing them for delivery, and would not delay any longer, and that they must get the wool forwarded, and the letter ends: "Kindly let us have a reply by return. Wire if possible. Awaiting your reply." There was a long interval between that letter and the next communication from the plaintiffs, which is dated the 18th December. One would think that if there was such urgency when the letter of 5th December

was sent, such a long delay would not have occurred. The letter dated 18th December, a fortnight later, is as follows:—"We wrote you on 5th December asking you when we may expect delivery of the ten tons of wool. Kindly let us have a reply by return, and oblige. We take this opportunity of wishing you the compliments of the season." It is very hard to reconcile the tone of the letter of 5th December with the very moderate tone of the letter of the 18th December, unless on the assumption that the plaintiffs had got the wool at current prices in the meantime. The defendant did not reply to that letter. On the 18th January, 1924, the plaintiffs' solicitors wrote to the defendant that the wool must be delivered by the 28th inst., or they would take proceedings. The defendant did not reply to that letter. It was proved by the evidence given before me that the price of wool had risen during the month of November, and, to a lesser extent, in the month of December, 1923, and that there was a very substantial and progressive rise in price during the month of January, 1924.

I hold that a reasonable time for delivery had elapsed by 5th December, and that the wool should have been delivered on or before that date. I further hold that the refusal or neglect of defendant to answer the plaintiffs' letters of 5th December and the 18th December amounted to a refusal by the defendant to perform his contract, one month prior to his receipt of the letter of the 18th January, 1924, from the plaintiffs' solicitors.

The measure of damages is prescribed by sect. 51 of the Sale of Goods Act, 1893. That section provides that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery (sub-s. (1)). The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract (sub-s. (2)). And then sub-s. (3) provides:—"Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." The section, it will be seen, states two alternative dates for ascertaining the measure of damages, namely, "when the goods ought to have been delivered," or, if no time was fixed, then "the time of the refusal to deliver."

I have held that the conduct of the defendant in not answering the letters of the plaintiffs amounted to a refusal to deliver, that before the end of December there had been a refusal by the defendant to deliver the wool to the plaintiffs, and that the plaintiffs were not entitled to wait until the end of January before accepting such refusal. Accordingly, the next question is, was there an available market for the goods in question, and, if so, what was the difference between the

Sullivan P. 1924.

MACAULEY v. HORGAN.

market price and the contract price at that time? There was no evidence as to the existence of an available market for wool at Cahirciveen where delivery was contracted for, but, having regard to the previous dealings between the parties and the inter-communication between Cahirciveen and Dublin, I think that the market price at Cahirciveen may, for the purposes of the measure of damages, be taken to be the market price at Dublin, less the cost of carriage, and, accordingly, I hold that the plaintiffs can rely on the market price in Dublin. I think that *Wertheim* v. *Chicoutimi Pulp Co.* (1) justifies me in so holding and in accepting evidence of the Dublin price.

Accordingly, the next question is, what was the Dublin price at the end of December? [His Lordship then dealt with the figures given in evidence as to the price of such wool in Dublin at the end of December, and held that the price then was £100 in excess of the price contracted for, and continued:—]

Accordingly, I hold that the price of wool in Dublin at the end of December was £100 over that contracted for, and from this I deduct £50 for the cost of carriage to Dublin, and I therefore assess damages at £50.

Solicitors for the plaintiffs: *Barrington & Son.*
Solicitor for the defendant: *M. J. O'Sullivan.*

H. H.

(1) [1911] A. C. 301.

THE STATE *v.* FELIX M'MULLEN (1).

Court of Crim. App. 1924. July 21, 22, 25.

Criminal appeal—Police officer killed—Attempting to apprehend felons—Prisoner charged with murder—Manslaughter excluded—Judge's direction—Discharge of jury—Second trial—Duty of Judge.

Two men, F. M. and P. J., armed with revolvers, entered a bank for the purpose of committing a robbery. When they emerged from the bank they were pursued by a Civic Guard in uniform, who called upon them to halt. F. M. fired from his revolver, and shot the Guard dead. Both men were put on trial for wilful murder. The Judge at the trial refused to allow counsel for the accused to address the jury on the question of manslaughter, and directed the jury that the killing of a police officer in apprehending, or attempting to apprehend, felons was murder or nothing. The jury, having deliberated for some time, returned to Court, and the foreman asked the Judge: "Can we reduce the crime to one of manslaughter?" The Judge, having replied in the negative, sent back the jury. They returned again, and the foreman, having announced that they were still unable to agree, the Judge asked if he could assist them in any way, and the foreman said: "Alter the charge as I suggested—if you could alter the charge ——." The Judge again said that that could not be done, and the jury were again sent back; and when asked on their third return "Have you agreed?" the answer was "No." They were then discharged, and two days later the accused were again put on trial for the murder.

Counsel for the prisoners objected to their being put on trial again for murder, on the ground that at the first trial the jury had intimated that they had agreed to find a verdict of manslaughter if they had the power to do so, and that the direction by the Judge to the contrary was wrong. The objection was overruled, and, at the close of the case for the prosecution, the Judge again ruled that the question of manslaughter was not open. F. M. was found guilty of murder, and was sentenced to death. P. J. was acquitted. The Judge having refused a certificate that the case was a fit case for appeal, F. M. appealed to the Court of Criminal Appeal. It was submitted on behalf of F. M. that the second trial was in the circumstances without jurisdiction and a nullity, and that even if it was proper to try him a second time for murder, the second trial was a mistrial owing to the direction by the Judge that the jury could not find a verdict of manslaughter.

Held, that what occurred at the first trial did not amount to agreement on the part of the jury to find a verdict of manslaughter, but was an effort by them to obtain further guidance and assistance:

That it is lawful for the Judge at the trial to discharge a jury before verdict when necessity, in the sense of a high degree of need, for such discharge is made evident to his mind from facts ascertained by him. The existence of such necessity or high degree of need is a matter within the determination and discretion of the trial Judge alone, and his decision is not open to review:

That in a proper case, such as that of a police officer killed in the execution of his duty trying to apprehend felons, the Judge must direct a jury that the crime is murder, and that they cannot find manslaughter, i.e. "cannot" according to their oaths:

That prisoner's counsel is not entitled to invite the jury to defy the Judge's rulings and directions on law, and to find a verdict on an issue not before them under such directions.

(1) In the Court of Criminal Appeal, before KENNEDY C.J. and SULLIVAN J. (President of the High Court), FITZGIBBON, JOHNSTON, and MURNAGHAN JJ.

Court of Crim. App. 1924.

THE STATE *v.* M'MULLEN.

CRIMINAL APPEAL.

The appellant, Felix M'Mullen, was with one, Peter Jordan, tried at the Central Criminal Court on July 7th and 8th, 1924, for the wilful murder on January 28th, 1924, of Patrick O'Halloran, a member of the Civic Guard at Baltinglass, County Wicklow. The jury disagreed, and were discharged. Both prisoners were put on trial again on July 10th, 1924, and the appellant was found guilty by the jury, and sentence of death was passed by the Judge (O'Shaughnessy J.). Jordan was acquitted.

On January 28th the two accused were driven from Dublin to Baltinglass in a hired motor-car. Each of the men was armed with a revolver. Upon arrival at Baltinglass they drove first to the Post Office and next to the National Bank. Having satisfied themselves that there was no telephone at either place, they ordered the chauffeur to drive back towards the Post Office and to remain there until their return. The car was then facing towards Dublin. The accused then went back to the bank. They informed a clerk that they wanted to see the manager. The manager, Mr. M. Woulfe, with a customer was then in an apartment, called the boardroom, off the office. When the manager opened the door for the two men, Jordan, holding a revolver in his direction, shouted: "Hands up; hand over the keys." M'Mullen, then inside the counter, had the bank teller covered with his revolver. The manager drew a pistol from his pocket, and presented it at M'Mullen and Jordan in turn. A shot was discharged from M'Mullen's revolver, and the manager, wounded, fell to the ground. When he cried for help M'Mullen threatened to blow his brains out if he did not "shut up." After the manager had been shot his wife entered the office, and when one of the clerks asked her to go for a doctor M'Mullen told her to go back or he would shoot her. Mrs. Woulfe, however, disobeyed the order. She ran out, M'Mullen followed her, but returned immediately, and closed the door leading into the street. During the interval in the bank Jordan asked a clerk where was the safe? When Mrs. Woulfe reached the street she shouted: "Help, help, there's a raid on the bank." Guard O'Halloran, in uniform, hastened towards the bank, knocked at the door, then kicked it; but there was no answer, and he took out his whistle and blew it. Joseph Germain, a resident in the town, handed the Guard an automatic pistol. The two prisoners emerged from the bank and ran along the street towards the motor-car. They were pursued by Guard O'Halloran, who called upon them to halt. According to one witness M'Mullen turned round, and fired at the Guard who fell mortally wounded. Other eye-witnesses said that the prisoners were running backwards. Practically all the witnesses agreed that the shot which killed the Guard was fired by M'Mullen. The further facts are set out in the judgment of the Chief Justice.

Shortly after he had been arrested M'Mullen made a signed statement to the Inspector of the Detective branch of the Dublin Metropolitan Police in the course of which he said: "We left the bank and ran across the street. When we were running across the street I put the gun behind my back and fired a shot. We went to the car, which was at the Post Office, and came back to Dublin. I did not know the Civic Guard was wounded until I seen (*sic*) it in the paper next day."

On the occasion of the first trial, while counsel for the accused was addressing the jury, O'Shaughnessy J. said: "I won't allow any question of manslaughter in this case. I won't allow any such thing to be discussed by the jury. It is a case of murder or nothing." Counsel submitted that if the shot was fired by M'Mullen accidentally in the heat of the moment, without any intention of hitting, that that would reduce the crime from murder. The Judge said that the killing of a police officer in apprehending, or attempting to apprehend a felon, had never been reduced to manslaughter. He accordingly directed the jury that it was a case of murder or nothing.

The jury were discharged for failure to agree upon a verdict. The report of the discussion which took place between the foreman and the Judge is set out fully in the judgment of the Chief Justice.

When the prisoners were arraigned for the second time on July 10th their counsel made the two following objections in writing:—

(1) The prisoners by their counsel respectfully object to being a second time put upon their trial upon the indictment for wilful murder, inasmuch as a jury has been already empanelled to try the said indictment, and intimated to the learned Judge presiding at the said trial that they had agreed to find the prisoners guilty of manslaughter only, if they had power to do so, and were directed by the learned Judge that they had no power to do so; and such direction was not in accordance with law.

(2) The prisoners by their counsel respectfully apply to have their trial postponed until a new panel of jurors has been summoned, on the ground that a fair and impartial trial by the jurors on the present panel has been imperilled by the comments of the learned Judge at their former trial in the presence of the present panel upon the failure of the jury to convict the said prisoners of wilful murder.

These objections were overruled by O'Shaughnessy J., who said that the statement as to what occurred at the first trial was incorrect.

At the close of the case for the prosecution O'Shaughnessy J. ruled that the counsel for the accused would not be permitted to address the jury on the question of manslaughter.

Court of Crim. App. 1924.

THE STATE v. M'MULLEN.

The jury convicted the appellant, M'Mullen, of the wilful murder of Guard O'Halloran and acquitted Jordan. At the close of the trial O'Shaughnessy J. refused to grant a certificate under sect. 31 of the Courts of Justice Act, 1924 (No. 10 of 1924), that the case was a fit case for appeal, and from that refusal the appellant appealed. Application was also made for an order granting leave to appeal from the conviction of the appellant of wilful murder. The grounds for the appeal were as follows:—

(1) The said Felix M'Mullen had, previous to the said trial, been tried upon the same indictment for wilful murder by a jury, lawfully empanelled to try such indictment, on July 7th and 8th, 1924. The jury at the former trial had been directed by the learned Judge that they had no power to find a verdict of manslaughter upon the indictment; and after the jury had intimated that they desired to find such verdict of manslaughter, they were directed by the learned Judge that they had no power to do so; and such direction was wrong in point of law.

(2) There was no disagreement of the jury at the first trial as they agreed to find the verdict of manslaughter against Felix M'Mullen, which verdict ought in point of law to have been received and recorded.

(3) The learned Judge had no power to adjourn the trial on the ground of a disagreement of the jury unless and until he had directed the jury that they had power to find a verdict of manslaughter on an indictment for wilful murder.

(4) The learned Judge at both trials directed the jury that there was no evidence upon which they could find Felix M'Mullen guilty of manslaughter, which said direction was wrong in point of law.

F. W. Price K.C. and *Nolan Whelan*, for the appellant:—

We submit the following propositions:—(1) Upon an indictment for wilful murder the jury have an absolute right to find a verdict of manslaughter, and, no matter what the evidence may be, or even though the verdict might appear perverse, the Judge has no right to prevent the jury from finding a verdict of manslaughter. (2) Even if the jury had not the absolute right mentioned, there was at the first trial sufficient evidence to entitle them, if they so thought fit, to find a verdict of manslaughter. (3) The jury had, in fact, intimated to the Judge at the first trial that they had agreed to find a verdict of manslaughter, and such verdict ought to have been recorded. (4) If the jury were, in fact, willing to find a verdict of manslaughter, the Judge had no right to discharge them and put the prisoners on trial again; and the second trial was without jurisdiction and a nullity. (5) If the foregoing propositions be

correct this Court may enter a verdict of manslaughter. (6) Assuming the second trial to be a proper trial, there was some evidence to reduce the crime to manslaughter; but as the Judge ruled that counsel for the accused should not address the jury on that question, the second trial was a mistrial.

The jury are the only competent judges of fact: 2 Hale's Pleas of the Crown (1778 edition), p. 313; and upon an indictment for murder they cannot be prevented by the Judge from bringing in a verdict of manslaughter: *Mackalley's Case* (1); *R.* v. *Yeadon and Birch* (2); *R.* v. *Parks* (3); a Judge cannot himself draw an inference where the general issue is before the jury: *R.* v. *Farnborough* (4). Where a jury is improperly discharged a second trial is a nullity: *R.* v. *M'Mahon* (5).

It was open to the jury on the evidence to find that the shot which killed the Civic Guard was not fired intentionally to kill; and that the accused had fired to frighten the Guard. However weak a case for the defence may be, it ought to be left to the jury. [They cited: *R.* v. *Porter* (6); *R.* v. *Dinnick* (7); *R.* v. *Hill* (8); *R.* v. *Hopper* (9).]

The Attorney-General (*J. O'Byrne K.C.*) and *Carrigan K.C.* (with them *Bewley*), for the State:—

There was no disagreement on the part of the jury at the first trial, and the Judge was entitled to discharge them. The second trial was a proper trial, and there was no misdirection. As a matter of fact the Judge said that in a proper case the jury might, on a charge of murder, bring in a verdict of manslaughter. In this case the crime could not be reduced to manslaughter, because the death of a police officer, as the result of intentional forcible opposition whilst he is engaged in the performance of his duty, is murder: Halsbury's Laws of England, Vol. 9, p. 573, par. 1164; 1 Hale P.C. 457, 460; Archbold's Criminal Pleading (26th edition), page 897. Guard O'Halloran while acting in the performance of his duty was shot and killed by M'Mullen, and whether the prisoner intended to hit him or not, that is murder. [They cited *R.* v. *Maloney* (10); *R.* v. *Scholey* (11); *R.* v. *French* (12); *R.* v. *Robinson* (13); *R.* v. *Foy* (14); *R.* v. *Fletcher* (15); *Winsor* v. *The Queen* (16); *R.* v. *Phillis* (17); *R.* v. *Tooley* (18).]

(1) 9 Co. Rep. 67b.
(2) 9 Cox, Cr. C. 91.
(3) 10 Cr. App. R. 50.
(4) [1895] 2 Q.B. 484.
(5) Ir. R. 9 C. L. 309.
(6) 12 Cox, Cr. C. 444.
(7) 3 Cr. App. R. 77.
(8) 7 Cr. App. R. 26.
(9) 11 Cr. App. R. 136.
(10) 9 Cox, Cr. C. 6.
(11) 3 Cr. App. R. 183.
(12) 14 Cox, Cr. C. 328.
(13) 16 Cr. App. R. 140.
(14) 2 Cr. App. R. 121.
(15) 9 Cr. App. R. 53.
(16) L. R. 1 Q.B. 390.
(17) 32 T. L. R. 414.
(18) 2 Ld. Raym. R. 1296.

Court of Crim. App. 1924.

THE STATE *v.* M'MULLEN.

July 25.

Price K.C., in reply:—In substance and in fact the jury had been prevented from exercising a right of which they could not be deprived.

Cur. adv. vult.

The judgment of the Court was delivered by KENNEDY C.J.:—

The appellant, Felix M'Mullen, was on the 10th of July, 1924, at the Central Criminal Court, tried with one, Peter Jordan, for the murder of Patrick O'Halloran, a member of the Civic Guard, when the jury found the appellant guilty on the said charge of murder. Application was made to the Judge at the trial (Judge O'Shaughnessy) for a certificate, pursuant to sect. 31 of the Courts of Justice Act, 1924 (No. 10 of 1924), that the case was a fit case for appeal to the Court of Criminal Appeal, but the Judge refused to give such certificate. The present appeal is an appeal from the refusal of the Judge to grant the certificate. It was agreed that, upon the hearing of this appeal, all questions which it was desired to raise on behalf of the convict should be debated and disposed of as if leave to appeal had been granted.

The events prior to the death of Patrick O'Halloran have been established in evidence, and are not the subject of any controversy in any respect material to this appeal.

The appellant, M'Mullen, and Peter Jordan agreed together to carry out a raid for the purpose of robbery on the National Bank at Baltinglass. The crime was deliberately planned. They engaged a taxi-cab in Dublin, about mid-day on the 28th January last, and drove to Baltinglass. Each of them was armed with a loaded revolver, a ·45 Webley. Having arrived in Baltinglass, they drove to the Post Office and one of them enquired for a telephone, and finding that there was none there, they drove to the bank, went in and enquired for a telephone. They were informed that there was no telephone nearer than Dunlavin. Having thus assured themselves that they had nothing to fear from the telephone, they drove back to the Post Office, where they left the car standing, facing in the direction of Dublin, on the road by which they would return to town. They then returned on foot to the bank, which they entered, and producing their revolvers set about the criminal business for which they had come. The bank officials were ordered to put up their hands. The principal quarry upon which these men were set was the contents of the safe. The safe was in the private office of the manager, called the boardroom, where the manager was with a customer. Jordan went to the door of the boardroom, and, with revolver in hand pointed at the manager, shouted to the manager: "Hands up! Hand over your keys." M'Mullen had come inside the counter behind Jordan, and was holding his revolver covering the bank teller. The manager drew a pistol from his pocket and at first pointed

it at M'Mullen and then at Jordan. The manager then found himself looking down the barrel of M'Mullen's revolver. A shot was then discharged from M'Mullen's revolver, which hit the manager in the side and brought him to the ground. It is said on behalf of M'Mullen (and there is evidence in that direction) that M'Mullen's revolver went off on this occasion accidentally as the result of jostling, and that the prisoner did not deliberately fire at the manager; but when the manager shouted for help M'Mullen threatened to blow his brains out if he did not "shut up." When Mrs. Woulfe, the manager's wife, was running out for help, after her husband had been shot, M'Mullen called on her to halt, saying he would shoot her. She did, however, run out, and Mr. Price relies on this, and on the fact that some of the bank officials did not respond with alacrity to the order to put up their hands, and also on his contention that the shooting of the manager was accidental, as matters tending to show that, though M'Mullen had armed himself with a loaded revolver, he did not really intend to shoot anyone during the day's proceedings. The felony is, however, none the less complete.

After Mrs. Woulfe had run out, M'Mullen closed the bank door leading into the street. The shots had attracted the attention of persons in houses on the opposite side of the street. One of these went to the Civic Guard barracks. Another fetched a Colt automatic pistol which he had, loaded, but with a safety catch on, brought it out into the street, and seeing Guard O'Halloran, who had come up to the bank, gave it to him. O'Halloran had knocked at the bank door for admittance, and failing to get in, blew his police whistle. While he was being handed the Colt pistol, the two men, M'Mullen and Jordan, ran out of the Bank. O'Halloran, who was in Civic Guard uniform, called on them to halt, but they continued running, and he went in pursuit, running fast after them and gaining upon them. In order to reach their waiting car, the men had to run a distance along the street which bears upon a bridge lying in the same direction, then over the bridge to the head of the street where the car was.

There were several eye-witnesses of the flight and pursuit who gave evidence. There are some differences, or apparent differences, in the details of their accounts. One says they were running backwards. Two principal eye-witnesses say that at the crucial time M'Mullen turned round towards the Guard and fired as he was closing in on them. There is no difference, no controversy whatever as to this, that Guard Patrick O'Halloran was shot, and that the shot which brought him to the ground and caused his death was discharged from the revolver in M'Mullen's hand. M'Mullen made a signed statement to a detective officer in which he says: "We left the bank and ran across the street. When we were running across the street I put the gun behind my back and fired a shot. We went to

Court of Crim. App. 1924.

THE STATE v. M'MULLEN.

Kennedy C.J.

the car, which was at the Post Office, and came back to Dublin. I did not know the Civic Guard was wounded until I seen (*sic*) it in the papers next day." No eye-witness corroborates this account of the manner in which the shot was fired.

As already mentioned, this appeal is taken from a refusal of a certificate by the Judge at the trial on the 10th inst. Both prisoners had already been put on trial at the Central Criminal Court before the same Judge on the 7th and 8th July, when the jury were discharged for failing to agree to a verdict.

The first question raised in this appeal is concerned with the proceedings at the first trial. The evidence on both hearings was practically identical on all material matters. The only evidence offered on behalf of the accused was evidence as to character.

At the close of the case for the prosecution, when counsel for the prisoner came to address the jury, the Judge intimated that he would not allow any question of manslaughter in the case, and that he would not allow any such thing to be discussed with the jury; that it was a case of murder or nothing. Counsel argued that if the shot fired by M'Mullen was fired without any intention of hitting, that would reduce the crime from murder. The Judge, however, directed the jury that it was a case of murder or nothing, having regard to the fact that O'Halloran was a constable in uniform pursuing felons in order to apprehend them.

The jury retired at one o'clock, and were finally discharged at half-past three o'clock for failure to agree upon a verdict. In the meantime they had returned into Court three times, and had been sent back by the Judge. The following is the report of what took place on each occasion:—

"The jury retired at one o'clock to consider their verdict. They returned to Court at 1.45, and the foreman asked: 'Can we reduce the crime to one of manslaughter?'

"MR. JUSTICE O'SHAUGHNESSY: 'You cannot in this case reduce the charge to one of manslaughter, for the killing of a police officer trying to apprehend a felon is murder since the earliest times.'

"The jury retired again, and returned to Court at 2 o'clock. The following discussion then took place:—

"*The Foreman of the Jury*: 'I regret, my lord, that we are unable to come to an agreement in this case.'

"MR. JUSTICE O'SHAUGHNESSY: 'You must retire: I won't discharge the jury.'

"*The Foreman*: 'I don't think there is any use in going back.'

"MR. JUSTICE O'SHAUGHNESSY: 'This is not a case in which a jury ought not to be able to find a verdict. You must retire. I won't discharge the jury in this case.'

"*The Foreman*: 'I don't think we could find a verdict.'

"MR. JUSTICE O'SHAUGHNESSY: 'You asked me a question, sir?'

"*The Foreman*: 'Yes.'

"MR. JUSTICE O'SHAUGHNESSY: 'Allow me to say that when you asked me that question I replied to you, and the jury are bound to take the view of the Judge as regards the law. There is a right of appeal from that if it is wrong. They are bound to do that, and I cannot allow—

having regard to the question you asked me—I cannot allow the jury to be discharged until they find a verdict.'

"*The Foreman*: 'I don't think there is any use.'

"MR. JUSTICE O'SHAUGHNESSY: 'You must retire. Please retire.'

"The jury retired.

"The jury returned to Court again at 2.30.

"The following further discussions then took place:—

"*The Foreman*: 'Still unable to agree.'

"MR. JUSTICE O'SHAUGHNESSY: 'Go back. I won't have this to go on: it is not creditable. It is not a case for disagreement, the jurors must obey the law.'

"*The Foreman*: 'It is hopeless, my lord.'

"MR. JUSTICE O'SHAUGHNESSY: 'You must go back. Can I assist you in any way?'

"*The Foreman*: 'Alter the charge as I suggested. If you could alter the charge ——.'

"MR. JUSTICE O'SHAUGHNESSY: 'That is, in other words, you are of opinion that these men are guilty, that you want me to alter the charge.'

"*The Foreman*: 'Yes, alter the charge.'

"MR. JUSTICE O'SHAUGHNESSY: 'We cannot do that; I must send you back. Having stated to me that you think both these men are guilty, and that you only want to alter the charge from murder to manslaughter, I tell you that you are not entitled to do that in point of law. You are bound to obey the law. These men have their rights. They can go to the Court of Criminal Appeal if I am wrong, but you are bound to obey the law, and now retire.'

"The jury retired, and returned to Court again at 3.30. The following then took place:—

"MR. JUSTICE O'SHAUGHNESSY: 'Have you agreed? No, my lord'."

Counsel for the prisoners did not object to the discharge of the jury nor require that a verdict be recorded.

At the opening of the second trial, counsel for the prisoners objected to their being put on trial again on a charge of murder, but the objection was overruled.

At the close of the case for the prosecution the Judge again ruled that the question of manslaughter was not open. The jury found M'Mullen guilty of murder, as already stated, and acquitted Jordan.

We have listened with great attention to the most able and impressive argument addressed to the Court by Mr. Price. His first contention is that upon a trial for wilful murder the jury has an absolute right to find a verdict of manslaughter no matter what the evidence may be, and however perverse such a verdict may be, and that the Judge at the trial has no power or legal authority to prevent such a verdict being given; and that, in any case, there was sufficient evidence at the first trial to enable the jury to find manslaughter if they so wished. He then goes on to say that the jury at the first trial are shown, upon the transcript of the shorthand-writer's note of what occurred (*supra*), to have agreed upon a verdict of manslaughter, and that the prisoner is entitled to have that verdict recorded, and that the second trial is a nullity.

The Court, however, has examined the evidence on this point with the greatest care and has been wholly unable to find any

Court of Crim. App. 1924.

THE STATE v. M'MULLEN.

Kennedy C.J.

trace of an agreement by the first jury, either as to a verdict of manslaughter or as to any other verdict. It is to be observed that the two men were tried together, and it was clearly before the jury that they might acquit. What were they agreed upon—except, perhaps, that they should not acquit? As to which of the prisoners can it be said that there was agreement? Was the supposed agreement the same in the case of each prisoner? We cannot get an answer to any of these questions; yet we were asked to enter a verdict as agreed. Nothing could well be clearer than the complete failure to agree. The foreman, speaking in presence of his fellows, says finally, after repeatedly informing the Judge that the jury are unable to agree: "It is hopeless, my lord." True, the foreman throws out a suggestion about altering the charge, but even if that were permissible, he does not promise agreement. Indeed, it seems to us that the jury contained members, possibly a majority, who felt bound in conscience by their oaths to find a verdict of guilty on the charge of murder. These several interludes between the Judge and jury cannot, in our opinion, be regarded as anything more than efforts by the jury to obtain further guidance and assistance in a matter upon which some of its members found great difficulty.

From first to last, the jury never tendered or required the Judge to accept or to record a verdict of manslaughter in the case of either prisoner. The record truly shows disagreement.

Mr. Price, in the second branch of his argument in relation to the first trial, founds himself upon agreement in fact by the first jury to return a verdict of manslaughter against his client, M'Mullen, and contends first, that the jury were entitled to have that verdict, however perverse it may have been in the circumstances, recorded, and that it was the duty of the Judge to have received and entered it upon the record; and, secondly, that the Judge at the trial having failed to do this, it is now within the power and authority of this Court of Criminal Appeal to enter a verdict of manslaughter against M'Mullen, which he accordingly prays us to do.

Inasmuch, however, as we are satisfied, after a careful examination of the record and of the stenographer's report of what occurred at the first trial, that the jury did not express any agreement to find a verdict of manslaughter against either or both of the accused; nay, more, that, as up to the very moment of their discharge, they were in fact not agreed upon the finding of any verdict, we do not feel called upon to enter into a discussion of, or to express any opinion upon, the submissions and application so ably presented by Mr. Price on this branch of the case, based as they were upon the assumption of the existence of such agreement.

In the third branch of his argument in relation to the first trial, Mr. Price contended that the Judge had no right, in the circumstances, to discharge the first jury and proceed with a

second trial, and, therefore, that the second trial was without jurisdiction and a nullity. He relies upon *Reg.* v. *M'Mahon* (1), and particularly the judgment of O'Brien J. in support of his contention that the trial having been, as he puts it, illegally adjourned or postponed, he is entitled to have the judgment in the second trial arrested or such corresponding relief as the Court of Criminal Appeal is enabled to grant by virtue of the Courts of Justice Act, 1924. *Reg.* v. *M'Mahon* (1) was, however, a case of actual postponement of a trial *pro defectu juratorum* when the accused was arraigned, and it was held that the postponement in the facts of the case was illegal, because contrary to express statutory provision. It was not a case of the discharge of a jury in purported exercise of an undoubted judicial discretion, as in the present case.

Whatever controversy may have existed at one time as to the power to discharge, before verdict given, a jury to whose charge a prisoner has been committed in a capital case, the rule is now accepted to be without doubt as defined in *Winsor* v. *The Queen* (2), where all the learning on the question is collected and discussed. The rule stated in sweeping terms by Coke (Co. Litt. 227 *b*), qualified by Blackstone (4 Bl. Com. 360), and stated by Foster to be exploded (*Kinloch's Case*: Foster's Crown Cases, at p. 31), has now given place to the established rule and practice that it is lawful for the Judge at the trial to discharge the jury before verdict when necessity, in the sense of a high degree of need, for such discharge is made evident to his mind from facts ascertained by him. The existence of such necessity or high degree of need is a matter for the determination of the Judge at the trial, and for him alone, and his decision is not open to review. It is a matter depending upon the exercise of a judicial discretion both as to the facts relevant to be considered in the particular case and as to the effect of those facts. The statement of the result upon the record suffices to establish that the particular order for discharge was lawfully made, see *per* Erle C.J. in *Winsor* v. *The Queen* (2). If the Judge is satisfied that the jury have had full time for deliberation and that they cannot agree, or that unanimity can only be obtained by coercing some jurors by detention and physical discomforts to sacrifice conscientious convictions, no one would say that, were it open to review, the Judge's discretion and authority had been improperly exercised by discharging the jury. Mr. Price's answer is that there was not a true disagreement in the present case, and, therefore, that no necessity had arisen authorising the discharge of the jury. We are satisfied, however, that the first jury had not agreed upon a verdict, and that, until they had done so, the discharge of the jury was a matter within the discretion and determination of the trial Judge alone, who has the jury before him and is alone able to

(1) I. R. 9 C. L. 309. (2) L. R. 1 Q. B. 289, 390; L. R. 1 Q. B., at pp. 394, 395.

Court of Crim. App. 1924.

THE STATE v. M'MULLEN.

Kennedy C.J.

form an opinion as to whether any disagreement which appears is final or is likely to disappear after further deliberation. Hence his decision is not, and cannot be, open to review. Moreover, while not wishing to trespass on what is his sole province, we take leave to say that we see nothing in the facts to suggest any impropriety in the exercise of that discretion by the learned and very experienced Judge who presided at this trial.

We come now to the very important question raised by Mr. Price as to the second trial, which he contends was a mistrial, entitling him at least to have a verdict for the lesser crime of manslaughter substituted by this Court for the verdict of murder found against M'Mullen.

The principal ground of attack on the second trial is misdirection by the Judge in telling the jury that they could not find a verdict of manslaughter, and that it was murder or nothing; and objection is further taken that counsel for the accused was not permitted to address the jury on the question of manslaughter. The case for manslaughter, which Mr. Price argues on the facts, is that there was some evidence from which the jury might draw the inference (*a*) that M'Mullen's revolver went off accidentally; or (*b*) that though he fired his revolver, he did not intend to hit the Guard O'Halloran or, indeed, anyone else, but simply fired off his revolver to frighten back his pursuers; and that, if M'Mullen did not intend to hit anyone when he fired and killed the Civic Guard, he is not guilty of murder, but only of manslaughter. For the purposes of this argument, Mr. Price refers principally to *Reg.* v. *Porter* (1), of which, be it said, he has made most ingenious use.

It is necessary to recall the facts in relation to this argument. The accused was engaged in the perpetration of a serious felonious offence in the bank premises, when Guard O'Halloran came up to the bank door, and failing to get in, blew a police whistle for help. The sound of the police whistle put the raiders to flight. They ran out of the bank and made for the place where they had the car waiting. Each carried a loaded revolver. They had undoubtedly worked out their plan of escape beforehand. The Civic Guard, who was in uniform, followed, calling on them to halt, in hot pursuit, as it was his duty to arrest the culprits. There cannot be the smallest doubt on the evidence that the two men knew they were pursued by an officer of justice and knew that they were fleeing from the lawful arrest, trial, and punishment to which they had made themselves amenable. M'Mullen fired as the police officer gained upon him. That is not in question. The shot so fired killed Guard O'Halloran. Nor is that in question. It is, says Mr. Price, possible to believe that M'Mullen did not intend to hit O'Halloran, but only to stop him in pursuit by firing without aim to put him off; and, if the jury can be persuaded to

(1) 12 Cox, Cr. C. 444.

believe that, he argues that they should find manslaughter, and that a direction to the contrary is a misdirection which vitiates the second trial and verdict.

All the evidence at the trial is clear to the effect that M'Mullen fired deliberately at O'Halloran. M'Mullen's own signed statement is to the effect that he fired deliberately, that is, that the revolver did not go off by accident, but he says he did not know that the Civic Guard was wounded. He does not suggest that he did not fire at the Guard, or that he did not fire with the intention of hitting someone. Still, Mr. Price contends that, however weak the suggestion may be of absence of deliberate intention to hit the Guard, it should be put to the jury to enable them to find a verdict of manslaughter upon it if they so wish.

The Judge at the trial refused to put an issue of manslaughter to the jury on the ground that O'Halloran, a police officer, was killed in the execution of his duty trying to apprehend felons, which is murder or nothing, and cannot be reduced to manslaughter. This is the direction challenged on this appeal. It raises a question which is the subject of authority, ancient and modern.

"The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, etc., is killed in the execution of his office, in such a case, it is murder." So says Hale (1 P.C. 457), and again: "If a constable, or tithing-man, or watchman be in execution of his office, and be killed, it is murder; and in all cases of implied malice, or malice in law, the indictment need not be special, but general *ex malitiâ sua praecogitatâ interfecit et murdravit,* and the malice in law maintains the indictment" (1 P.C. 460), which proposition he rests on *Mackalley's Case* (1).

Foster writes (Crown Cases 308): "Ministers of Justice while in the execution of their offices are under the peculiar protection of the law. This special protection is founded in great wisdom and equity and in every principle of political justice. For without it the public tranquillity cannot possibly be maintained or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. And for these reasons, the killing of officers so employed hath been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the Kingdom." He develops this topic with many instances. He takes the case of a robbery committed on the highway or elsewhere, when the country upon notice "riseth and pursueth the robbers who turn and make resistance." If, in the struggle, one of the pursuers is killed by the robbers or any of them, "it will be murder in the whole gang joining in such resistance whether present at the murder or at a distance, but taking a part in such resistance."

(1) 9 Co. Rep. 68.

Court of Crim. App. 1924.

THE STATE *v.* M'MULLEN.

Kennedy C.J.

The rule of law has been carried down through the years without losing its validity. It will be found stated thus in Stephen's Digest of Criminal Law in the Sixth (the latest) edition, at pp. 182, 183:—

"Murder is unlawful homicide with malice aforethought. Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated . . . .

(*d*) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed. The expression 'officer of justice' in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person."

This we take to be a correct statement of the present state of the law on this subject, as it is also of the ancient.

M'Mullen, warned in the midst of his felony by the police whistle, in flight from arrest, pursued by the officer of justice in uniform, who keeps calling on him to halt, fires his revolver back towards his pursuer for the purpose of opposing the execution of the duty of effecting his arrest, kills the officer of justice, the Guard O'Halloran. It matters not that he did not—if, indeed, he did not—mean to hit him. It is murder according to the law, and the learned trial Judge, O'Shaughnessy J., was absolutely right in so directing the jury.

The only answer which Mr. Price has been able to make, and he has done it with the utmost ingenuity and ability, cannot stand examination. He relies on *Reg.* v. *Porter* (1), where a kick delivered by a prisoner in a struggle caused the death of a man who was helping the police, and it was said that if he did not kick to hit the deceased, but that his leg came accidentally in contact with him in the mêlée and caused his death, that would be manslaughter. The prisoner was not resisting arrest. He was objecting to being conveyed by a particular vehicle. We are of opinion that that case is wholly different in its facts from the present, and that it does not cut down or qualify the principles which I have quoted as ruling the case of an officer of justice opposed by force and killed while trying to effect a lawful arrest, which is murder.

There is abundant authority, more particularly since the establishment of the Court of Criminal Appeal in England, that when no defence of manslaughter appears on a murder case as it stands upon the evidence before the Court, the Judge is entitled, even bound, to withdraw manslaughter from the jury, and

(1) 12 Cox, Cr. C. 444.

direct that their verdict must be guilty or not guilty of murder. This has been laid down in a number of reported decisions such as *R.* v. *Maloney* (1); *R.* v. *French* (2); *R.* v. *Phillis* (3); *R.* v. *Robinson* (4) (probably not binding on us owing to its date, but a valuable judgment); *R.* v. *Fletcher* (5); *R.* v. *Foy* (6), etc. Nevertheless we are asked to say that even where the Judge has directed the jury, as it is his province to do, that in law manslaughter is not open, and that they must find murder or acquit, still he must go on and tell them that though bound by their oaths to act according to his direction, they are entitled to ignore his direction and their oaths and, if they so wish, to bring in a verdict of manslaughter and require him to record it. We express no opinion as to the effect of a jury so acting, but it is abundantly clear that the Judge must in a proper case, as this is, direct a jury that they cannot find manslaughter, i.e. "cannot" according to their oaths. How much further the prohibition goes we are not called upon to consider here.

Lastly, Mr. Price has objected to the second trial, because the Judge limited him to the issue of guilty or not guilty of murder, and did not permit him to discuss a verdict of manslaughter with the jury. We must be particularly jealous to preserve the liberty and privileges of prisoner's counsel, but we cannot hold that he is entitled to invite the jury to defy the Judge's rulings and directions on law, and to find a verdict on an issue not before them under such directions.

We are of opinion that the verdict at the second trial was a valid and legal verdict, and must stand.

Solicitor for the appellant: *Charles T. Murray.*
Solicitor for the State: *M. A. Corrigan.*

C. L.

(1) 9 Cox, Cr. C. 6.
(2) 14 Cox, Cr. C. 328.
(3) 32 T. L. L. 114.
(4) 16 Cr. App. R. 140.
(5) 9 Cr. App. R. 53.
(6) 2 Cr. App. R. 121.

Supreme Court.
1924.

Oct. 28.
Dec. 4.

THOMAS CONNOR, BY HIS FATHER AND NEXT FRIEND, JOHN CONNOR, PLAINTIFF; CORNELIUS O'BRIEN, DEFENDANT (1).

(1924. No. 3860.)

Practice — Transfer of action — Action commenced in the High Court — Transfer to Circuit Court — Jurisdiction — Action of tort — Personal injuries—Unliquidated damages—No specific amount claimed—Test whether action should be transferred—Courts of Justice, Act, 1924 (*No.* 10 *of* 1924), *sects.* 25, 48, 51, 56.

An infant plaintiff, suing by his father and next friend, instituted an action in the High Court, claiming damages from the defendant for personal injuries and for damage to his motor bicycle occasioned through the negligent driving of defendant's motor car. Plaintiff was a carpenter by trade, earning £2 18s. a week, with other occasional employment in his spare time; and the injuries complained of were a compound fracture of his right leg, alleged to result in shortening of the limb, and other possible consequences of a non-permanent character. Plaintiff merely claimed damages in his writ, without specifying any amount. Defendant applied to have the action transferred to the Circuit Court. The jurisdiction of the Circuit Court prescribed by sect. 48 of the Courts of Justice Act, 1924, in cases of tort (unless on consent) is "jurisdiction when the claim does not exceed £300." In an affidavit in support of the motion to transfer, defendant stated that plaintiff's father and next friend had no visible means to pay his (defendant's) costs if a verdict was found against the plaintiff, that he had a good defence to the action, and denied liability. In another affidavit in support of the motion a doctor stated that the plaintiff's injuries would not in all probability leave any permanent disfigurement, and that the plaintiff ought to be able to resume work within a month. In an affidavit resisting the motion, plaintiff made a case, on money lost for twenty-three weeks since the accident, of over £120.

Held (reversing Murnaghan J.), that the action ought not to be transferred to the Circuit Court.

Per Kennedy C.J.: The High Court has jurisdiction to transfer to the Circuit Court an action claiming unliquidated damages in tort if, on the facts, it appears, that the action might have been commenced in the Circuit Court. And in determining whether a particular action might, on its facts, have been commenced in the Circuit Court, the plaintiff's statement of his case (unless unequivocably displaced) must be accepted for this purpose, and the question must resolve itself into this: Has the plaintiff stated (upon the affidavits opposing an application to transfer the action) a case upon which a jury could reasonably give him a verdict for a sum exceeding £300? If a jury found for him upon that statement of his case and nothing more, and awarded him any larger sum than £300, would the verdict be set aside on the ground that the damages were excessive? That is the primary test by which the question of transfer to the Circuit Court of actions for unliquidated damages in tort must be determined.

Per FitzGibbon J.: In deciding whether an action might have been commenced in the Circuit Court, or whether it ought not to have been commenced in the High Court, whether a sum exceeding £300 has been formally claimed, or the originating process has been endorsed with a claim for damages generally, without specifying an amount, if the amount of damages recoverable is the only question involved in the decision, the Court must consider whether the plaintiff could reasonably contemplate the recovery of a sum for damages beyond the jurisdiction of the Circuit Court. If a verdict for a sum exceeding £300, given by a reasonable jury, properly directed and acting upon the evidence as presented to the Court, would not be set aside as excessive, the action ought not to be transferred.

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Per Kennedy C.J.: The question of the transfer of an action from the High Court to the Circuit Court must be approached in a different way, and be determined by different considerations from the question of remittal of actions to the former County Courts.

Per FitzGibbon J.: Under the present procedure presence or absence of visible means does not affect the result.

APPEAL from an order made by Murnaghan J. transferring the action for trial to the Circuit Judge of the County of Dublin. The application to transfer was made under sect. 25 of the Courts of Justice Act, 1924 (1). The plaintiff, an infant, suing by his father and next friend, sued the defendant "for damages for personal injury and damages to plaintiff's motor bicycle through the negligent driving of the defendant's motor car by the defendant or his servants" on May 30th, 1924, on the Chapelizod road.

The grounds upon which the motion was made by the defendant and upon which it was resisted by the plaintiff are set out in the judgment of the Chief Justice.

Tobias, for the appellant:—

The learned Judge misdirected himself in remitting this action. The actual pecuniary damage will be at least £120, and the total damages are likely to exceed £300, the amount to which the jurisdiction of the Circuit Court is limited in actions of tort by sect. 48 of the Courts of Justice Act, (1924) (No. 10 of 1924). This is not an action which should have been commenced in the Circuit Court. Under the former system when an action claiming unliquidated damages was remitted to the County Court the jurisdiction of the latter Court in regard to the amount of damages which might be awarded was unlimited. In an action of tort transferred to the Circuit Court under the Courts of Justice Act, 1924, the Circuit Court cannot award more than £300 damages. The effect of the transfer in a case like this would be to preclude the plaintiff from recovering the full amount of damages that a jury might award him.

(1) Courts of Justice Act, 1924, sect. 25:—"When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may, at any time before service of notice of trial therein, apply to the High Court that the action be remitted or transferred to the Circuit Court, and thereupon, in case the court shall consider that the action is fit to be prosecuted in the High Court, it may retain such action therein, or if it shall not consider the action fit to be prosecuted in the High Court it may remit or transfer such action to the Circuit Court or (where the action might have been commenced in the District Court) the District Court, to be prosecuted before the Judge assigned to such Circuit or (as the case may require) the Justice assigned to such District, as may appear to the High Court suitable and convenient, upon such terms, in either case and subject to such conditions, as to costs or otherwise as may appear to be just:

"Provided that the High Court shall have jurisdiction to remit or transfer any action, whatever may be the amount of the claim formally made therein, if the court shall be of opinion that the action should not have been commenced in the High Court but in the Circuit Court or in the District Court if at all."

Supreme Court. 1924.

CONNOR v. O'BRIEN.

Gavan Duffy, for the respondent:—

It is unlikely on the facts that the plaintiff, if successful, will recover any substantial damages. There is nothing in the Courts of Justice Act, 1924, to limit the amount recoverable in a transferred action. The proviso to sect. 25 bears out this view; and the whole policy of the Act is to relieve the High Court of litigation more fit for trial in the Circuit Courts which are tribunals with a jurisdiction much larger than that of the former County Courts. The policy of the Act cannot be defeated by the expedient of claiming unliquidated damages.

The onus is on the plaintiff to show that the action is more fit for the High Court. It has been held that the expression "case fit to be tried in the Superior Courts" must be taken to mean a case which "ought" to be tried there, or is "more fit" to be tried there than in an inferior Court: *Banks* v. *Hollingsworth* (1). This test should be applied to the words "fit to be prosecuted in the High Court" in sect. 25 of the Courts of Justice Act. The order transferring the action for trial before the Circuit Judge was made by the Court below in the exercise of its discretion; and the Court of Appeal has always been very slow to interfere with such orders. It would be a great hardship on defendants if penniless plaintiffs were encouraged to take High Court proceedings in actions of this kind in which the defendants must, in any event, lose money.

Dec. 4.

KENNEDY C.J.:—

This is an appeal from an order of the High Court that an action be transferred for trial before the Circuit Judge of the County of Dublin.

The action is brought by one, Thomas Connor, an infant, suing by his father and next friend, against Cornelius O'Brien. The plaintiff's claim, as endorsed upon the writ, is "for damages for personal injury and damages to plaintiff's motor bicycle through the negligent driving of defendant's motor car by defendant or his servants." The defendant, in his affidavit grounding the motion, says that the plaintiff's father and next friend has no visible means to pay his (defendant's) costs should a verdict be found against the plaintiff, and he (the defendant) says that he has a good defence to the action, denies negligence on his part, and repudiates responsibility for the occurrence out of which the claim arises. An affidavit is also filed on behalf of the defendant wherein a medical man deposes that the injuries, which were sustained by the infant plaintiff on the 30th of May last, will not in all probability leave any permanent disfigurement, and that the plaintiff should be in a position to resume work within one month from the date of the affidavit. The nature of the injuries sustained by the infant plaintiff are not in question. They consist of a compound fracture of his

(1) [1893] 1 Q. B. 442.

right leg, which, in the case put forward on behalf of the plaintiff, is said to have resulted in a shortening of his leg and also other possible consequences of a non-permanent character. The plaintiff is a carpenter by trade, in regular employment, at a wage of £2 18s. a week. He has not yet been able to resume that occupation, which involves climbing ladders and scaffolding. He also deposes to some additional earnings, of uncertain and probably varying amounts, from employment as member of a band in his leisure time, at a remuneration of 15s. a night when playing, which employment he has also been unable to resume.

For the purpose of this motion we must assume the liability of the defendant, and, if that liability be established, the plaintiff has made a case, on money lost, which would amount for 23 weeks to something over £120. Mr. Tobias, for the plaintiff, says that if his client succeed, his verdict for damages, covering on the one hand actual loss in moneys numbered together with prospective further loss, and, on the other hand, compensation for suffering, must exceed the sum of £300, and that the plaintiff's claim could not have been set out in the writ at a less figure than £300. He says, therefore, that the action was not one in the first instance within the jurisdiction of the Circuit Court and could not have been instituted there, and should not have been transferred to that Court. He contends that the Judge of the Circuit Court has not, in the case of a transferred action, an unlimited jurisdiction in the same way that a County Court Judge had in the case of a remitted action on the Common Law side. Mr. Gavan Duffy, for the defendant, contends, in the first place, that it is established on the affidavits that any verdict the plaintiff may recover would, on the facts, be under £300, and that the transfer of the action being a matter for the exercise of the Judge's discretion in the High Court, this Court should not interfere with such discretion. He further argues that there is an onus on the plaintiff to show that his action is more fit for the High Court than for the Circuit Court, which onus he says has not been discharged. He contends further that, by reason of the proviso to sect. 25 of the Courts of Justice Act, 1924 (No. 10 of 1924) (1), there is jurisdiction in the High Court to transfer to the Circuit Court any action, whatever may be the amount claimed.

This application raises for the first time a matter of far-reaching importance in the administration of the Courts of Justice established by the Courts of Justice Act, 1924, namely, the distribution of business amongst the several Courts created and set up by that Act. It is concerned, however, with the application of the Act to one only of the various classes of action with reference to which the question will from time to time arise, that is to say, with the class of action for damages in respect of a tort where the claim is for damages stated

(1) Sect. 25 is set out in the note on p. 25, *ante*.

Supreme Court. 1924.

CONNOR v. O'BRIEN.

Kennedy C.J.

generally, the plaintiff being unwilling to measure his claim in money, at least in his writ.

The Courts of Justice Act, 1924, has given us in a single statute a complete scheme of Courts, comprising four separate but co-related units, which are to exercise the judicial power of, and administer justice in, the Saorstát. By virtue of the Constitution, the High Court of Justice is invested with universal original jurisdiction, but power was given to the Legislature to set up Courts of local and limited jurisdiction (excepting, however, certain constitutional questions, the original jurisdiction in which belongs exclusively to the High Court). The Legislature, acting under this authority, set up the Circuit Court of Justice and the District Court of Justice to exercise locally throughout the country carefully defined jurisdictions. The policy of the Act is unmistakable. It is that the great bulk of the ordinary litigation not involving very heavy financial consequences and of the criminal business of the country shall be dealt with and disposed of in the local venue. This is something quite different from the position of the old County Courts. In the case of the Circuit Court it is made clear that the parties are not to be prejudiced either as to mode of trial, whether with or without juries, or as to the resulting relief, whether principal or ancillary, by reason of the forum being the Circuit Court rather than the High Court. See particularly, for example, sects. 47, 57 to 60 inclusive, and 94 to 96 inclusive. The trial of an action in the Circuit Court is to differ from the trial of a similar action in the High Court only in venue and in the outside limit of jurisdiction in relation to the particular class of cause of action.

Having regard, then, to the policy of the Act and to the actual provision made for the local hearing of cases, it is manifest that the question of the transfer of an action from the High Court to the Circuit Court must be approached in a different way, and be determined by different considerations, from the question of the remittal of actions to the former County Courts.

One general rule may be stated at once as applying to all cases of transfer. It is the rule to be found in Article 65 of the Constitution, which makes it impossible to remove from the High Court the original determination of "the question of the validity of any law having regard to the provisions of the Constitution." Sect. 56 of the Courts of Justice Act makes certain other exclusions from the jurisdiction of the Circuit Court which do not bear on the class of case we are now concerned with. Subject to these specific exceptions, the primary consideration in determining the question of transfer under the Act must be, in an action *inter partes*, the consideration whether the measure of relief sought by the plaintiff exceeds the measure which the jurisdiction of the Circuit Court affords within the limits imposed upon it, or, in the words of sect. 25,

whether the action "might have been commenced in the Circuit Court."

The limitations on the jurisdiction of the Circuit Court in civil cases are set out in sect. 48 of the Act and the limitation relevant to the present case is that contained in paragraph (ii) of that section: "in tort . . . jurisdiction when the claim does not exceed £300."

In the present case the plaintiff has not chosen to put a figure on the damages he claims in his writ. It has been suggested that he could not have brought an action in the Circuit Court for an unliquidated claim of this kind. I can find no reason, however, for debarring a plaintiff in the Circuit Court from claiming damages generally. Should he do so, the Act imposes a maximum limit on his claim, and he would be simply in the same position as if he had added to his unliquidated claim some such words as—"not exceeding £300."

Inasmuch, therefore, as an action might, in my opinion, be commenced in the Circuit Court claiming unliquidated damages for tort, I am of opinion that the High Court has jurisdiction to transfer to the Circuit Court an action claiming unliquidated damages for tort which has been commenced in the High Court, if, on the facts, it appears that the particular action might have been commenced in the Circuit Court.

We have then to consider how the High Court is to determine the question whether a particular action might on its facts have been commenced in the Circuit Court. For this purpose, the facts of paramount importance are clearly those upon which the plaintiff rests his claim. The plaintiff's statement of his case (unless unequivocally displaced) must be accepted for this purpose, and the question must resolve itself into this:—Has the plaintiff stated (upon the affidavits opposing an application to transfer the action) a case upon which a jury could reasonably give him a verdict for a sum exceeding £300? If a jury found for him upon that statement of his case and nothing more, and awarded him any larger sum than £300, would the verdict be set aside on the ground that the damages were excessive? That, in my opinion, is the primary test by which the question of transfer to the Circuit Court of actions for unliquidated damages in tort must be determined.

If we apply that test to the present action, assuming that a jury found for the plaintiff on his own statement of the facts constituting his cause of action and of the facts as to the damage and loss he has suffered and is likely still to suffer, I am not prepared to say that a verdict in his favour for £300 or even a larger sum must be set aside as excessive and unreasonable.

In the view I have taken of the particular case before us, I have no occasion to examine and determine the other important questions raised in the course of the argument. What are the considerations which should lead the High Court to retain as "fit to be prosecuted in the High Court" an action which might

Supreme Court. 1924.

CONNOR v. O'BRIEN.

have been commenced in the Circuit Court? When an action is transferred to the Circuit Court, does that Court possess, by the joint effect of sect. 51 of the Courts of Justice Act, 1924, and sect. 52 of the County Courts Act, 1887, or otherwise, a jurisdiction exceeding that conferred by sect. 48 of the Courts of Justice Act? These questions must remain open, so far as I am concerned, until they are raised upon cases the decision of which involves their being answered.

I am, therefore, of opinion that this appeal should be allowed, and that the order transferring the action ought to be discharged.

O'CONNOR J.: I concur.

FITZGIBBON J.:—

The importance of this case arises from the fact that it is the first in this Court in which the principles that ought to govern the transfer of actions from the High Court to a Circuit Court have been discussed and must, to some extent, be laid down for use in future cases. Under the former system, embodied in the Common Law Procedure Act, absence of visible means, duly established, cast upon the plaintiff the onus of satisfying the Court that he had a cause of action fit to be prosecuted in the Superior Courts. Under the present procedure presence or absence of visible means does not affect the result.

It is a condition of any transfer to a Circuit Court that the action is one "which might have been commenced in the Circuit Court." If it could not have been so commenced it cannot be transferred.

If the action might have been commenced in the Circuit Court, it may, nevertheless, be retained in the High Court "in case the Court shall consider that the action is fit to be prosecuted in the High Court." Accordingly the first question to be answered by any Court to which an application for transfer is made is: "Might this action have been commenced in the Circuit Court?"

The jurisdiction possessed by the Circuit Court is to be found in the seven clauses of sect. 48 of the Courts of Justice Act, 1924, and of these the only one with which we are concerned is clause (ii): "In contract and tort (save matrimonial and criminal conversation actions)—jurisdiction when the claim does not exceed £300."

Primâ facie, therefore, in a case in which unliquidated damages are claimed, either in contract or tort, the jurisdiction of the Circuit Court would be excluded by the simple expedient of endorsing upon the writ or other originating process a claim for a sum exceeding £300.

To defeat this, sect. 25, which deals with the "Remittal or Transfer of Actions," contains a proviso: "that the High Court shall have jurisdiction to remit or transfer any action, whatever may be the amount of the claim formally made therein,

if the Court shall be of opinion that the action should not have been commenced in the High Court . . ."

Upon an application to transfer an action for unliquidated damages in contract or tort, whether no sum at all or a sum exceeding £300 is formally claimed, the Court must, therefore, answer the further question: "Was it improper to commence this action in the High Court?"

It is obvious that some actions in which amounts for less than £300 were claimed might nevertheless involve questions sufficiently important to make them "fit to be prosecuted in the High Court," but the present case does not fall within that category, and must be decided with regard only to the amount of damages properly recoverable.

In my opinion, in deciding whether an action might have been commenced in the Circuit Court, or whether it ought not to have been commenced in the High Court, whether a sum exceeding £300 has been formally claimed, or the originating process has been endorsed with a claim for damages generally without specifying an amount, if the amount of damages recoverable is the only question involved in the decision, the Court must consider whether the plaintiff could reasonably contemplate the recovery of a sum for damages beyond the jurisdiction of the Circuit Court. If a verdict for a sum exceeding £300, given by a reasonable jury properly directed and acting upon the evidence as presented to the Court, would not be set aside as excessive, in my opinion the action ought not to be transferred.

I do not say that the Court must be satisfied that £300 ought to be awarded; it is no part of our province to indicate to a jury what sum they ought to give, but if in the opinion of the Court a verdict given upon the evidence before it, exceeding £300 would not be unreasonably excessive, I should hold that the action was not improperly commenced in the High Court, and should be retained there.

It must not be imagined by jurors or other persons that an order retaining an action in the High Court is an invitation to give £300 or more by way of damages. We are, unfortunately, compelled to form an opinion upon evidence necessarily incomplete, given by witnesses whom we cannot see, and who have not been tested by cross-examination, and a figure arrived at upon such material may prove to be wholly unreasonable in either direction by the time the evidence at the trial has closed; but in this case upon the materials at present before the Court, I am not prepared to hold that a verdict for £300 would be so grossly excessive that it ought not to be allowed to stand, and accordingly I concur in the decision that the order appealed from should be discharged, and that this action should be retained in the High Court.

Solicitors for the appellant: *Joynt & Crawford.*
Solicitors for the Respondent: *Corrigan & Corrigan.*

C. L.

Supreme Court.
1924.

MICHAEL MONAHAN, PLAINTIFF, *v.* MARTIN M'NAMARA, DEFENDANT (1).

(1924. No. 8302.)

Dec. 4.

Practice—Transfer of action—Action commenced in High Court—Transfer to Circuit Court—Action of tort—Personal injuries—Damages exceeding £300—Courts of Justice Act, 1924 (*No.* 10 *of* 1924), *sects.* 25 *and* 48.

Plaintiff, a farmer's son, instituted an action in the High Court for assault, and claimed £500 damages. Defendant, who was also a farmer, applied to have the action transferred to the Circuit Court, that Court having jurisdiction in an action for tort when the claim does not exceed £300. In his affidavit in support of the application to transfer, defendant said that he had already been acquitted by a jury on a charge for the assault, and that he only struck the plaintiff in self-defence. In an affidavit resisting the application, a doctor described the plaintiff's injuries, which were of a serious character.

Held (reversing Murnaghan J.), that the action ought not to be transferred to the Circuit Court, as, having regard to the uncontradicted evidence of the doctor, the Court could not say that a verdict exceeding £300 would be set aside as excessive and unreasonable.

Connor v. *O'Brien,* [1925] 2 I.R. 24, applied.

APPEAL against an order of Murnaghan J., dated the 14th November, 1924, transferring the action for trial before the Circuit Judge of the County of Limerick.

By the writ, which was issued on the 15th October, 1924, the plaintiff claimed £500 damages for assault.

The defendant, a farmer, in his affidavit grounding the application to transfer the action, swore that he had a good and valid defence to the action; that on a charge for the same assault he was found "not guilty" and acquitted by a jury of the County of Clare on the 1st October, 1924, at the Ennis sittings of the South-Western Circuit, and that the plaintiff had no visible means of paying his (defendant's) costs should a verdict not be found for the plaintiff.

The plaintiff, a farmer's son, in his affidavit resisting the application, swore as follows: "The assault herein was committed on the 31st October, 1922. On that date I was having my dinner about 12 o'clock with my mother in my house when the defendant's sister Nora called me at the door. I went out in answer to her call, when the defendant rushed from behind the house, and, without any notice, struck me a violent blow on the head with a four-pronged manure fork. I was felled to the ground. I was taken to hospital later, and remained unconscious in hospital until the 11th of November, when I partially recovered. I recovered consciousness completely on the 20th of November, but I had a partial paralysis of the right side of the body, and also paralysis of the left eye. Dr. Holmes stated in his evidence before the Circuit Judge that the unconsciousness and paralysis were due to hæmorrhage of the brain which I suffered, resulting from the blow inflicted. I was in hospital for two months. After leaving hospital I had to give up all kinds of work that necessitated any kind of bending or physical effort. I had to consult Dr. Charles M'Donnell, eye specialist, of Limerick, about my eye, and up to the present time my right side has to be painted once a week with iodine. I constantly suffer from a very heavy, dull pain at the back of my left ear,

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

and I suffer from loss of memory; and, in fact, I am more or less a mental and physical wreck."

The plaintiff also alleged that a fair trial of the action could not be had either in Ennis or Limerick.

Dr. Holmes made an affidavit in which he stated that he examined the plaintiff on the 31st October, 1922. That the plaintiff had a wound about two and a half inches long on the left side of his head, and a great swelling over the left temple region. That the plaintiff was unconscious when he (the doctor) saw him, and on the 1st November, 1922, the doctor took him to hospital, where he remained until the 11th November, when he began gradually to recover consciousness, up to the 20th November. When he recovered on the 20th November he had weakness on the right side of his body. His life was in danger until about the 11th November. His condition on the 1st November was as follows:—He had paresis of the right side of his body; could move his right leg slightly; he had no power of movement of his right arm; he had slight facial paralysis, and his mouth was drawn to left side. He had ptoses of the left eyelid, left pupil very dilated, and left eye turned outwards and upwards. On the 3rd November, 1924, his mental condition was dull and lethargic, the movement of his legs and arms was normal but very slow, and, owing to his mental condition, his usefulness as a farmer was very limited, and he had to be told everything. His mental condition was likely to be permanent.

The defendant, in a replying affidavit, swore that he struck the plaintiff in self-defence only, and denied that a fair trial could not be obtained either in Limerick or Ennis.

Binchy, for the appellant.

Dockrell K.C. and *Reidy,* for the respondent.

KENNEDY C.J.: We have to deal with this motion on the evidence now before the Court. Applying the rule in *Connor* v. *O'Brien* (1), in which we gave judgment this morning, and taking the evidence now before us, we cannot say, having regard to the uncontradicted evidence of the doctor, that a verdict exceeding £300 could be set aside as excessive and unreasonable. The rule we laid down this morning governs this case, and we are of opinion that the appeal should be allowed, and the order transferring the action should be discharged.

O'CONNOR and FITZGIBBON JJ. concurred.

Solicitors for the appellant: *P. S. Connolly & Co.*
Solicitor for the respondent: *M. Tynan.*

(1) *Ante,* p. 24. R. ST. J. C.

NOTE.—The Supreme Court, on November 6th, 1924, decided the following case, which also deals with the question of transferring of actions:—

M'COLLUM v TEASE.

Practice—Transfer of action—Transfer from the High Court to the Circuit Court—Writ issued before establishment of Circuit Courts—Courts of Justice Act, 1924 (*No.* 10, 1924), *sects.* 2 *and* 25.

The writ in an action for assault was issued in January, 1924. A motion in the King's Bench Division to remit the action to the County Court Judge,

which was made in March, 1924, was refused. For the purpose of the establishment of the Circuit Courts (except the Dublin Circuit), the Courts of Justice Act came into operation on August 6th, 1924. An application by the defendant to the High Court on October 14th, 1924, to have the action transferred for trial to the Circuit Court, then established, was refused by Murnaghan J.

Held (affirming Murnaghan J.), that as the action could not have been commenced in the Circuit Court at the time it was commenced, there was no jurisdiction to transfer the action for trial to the Circuit Court under sect. 25 of the Courts of Justice Act, 1924.

APPEAL by the defendant from an order made by Murnaghan J., sitting as Vacation Judge, on October 14th, 1924, refusing to transfer the action for trial to the Northern Circuit Court. Part II of the Courts of Justice Act, 1924, which deals with the establishment of the Circuit Courts, did not come into operation (save Dublin City and County) until the 6th day of August, 1924. This was provided by the "Courts of Justice Act, 1924 (Commencement) (No. 3) Order, 1924" (No. 9 of 1924), dated 2nd day of August, 1924

Shannon K.C. (with him *Geoghegan*), for the respondent:—

By way of preliminary objection we submit that there is no jurisdiction to transfer an action of this kind, which was pending before the Circuit Court, to which it is sought to transfer the action, was set up under sect. 2 of the Courts of Justice Act. Sect. 25 of the Act deals with cases which "might have been commenced in the Circuit Court." This action could not have been commenced in the Circuit Court in January, 1924.

Overend K.C. (with him *E. J. Kelly*), for the appellant:—

The words, "when any action shall be pending," in sect. 25 cover every action which had been commenced and had not come to trial at the date the Act came into operation. In effect, the section says: "Any action pending and capable of having been commenced in the Circuit Court."

KENNEDY C.J.: We are all of opinion that Mr. Shannon has made a good preliminary point. Sect. 25 does not include actions which had been instituted before the Circuit Courts were established. This action could not have been commenced, at the time it was commenced, in the Circuit Court, because the Circuit Court had not then come into existence, and did not come into existence for many months afterwards. For these reasons the appeal must be dismissed.

O'CONNOR and FITZGIBBON JJ. concurred.

Solicitor for the appellant: *William Kelly.*
Solicitor for the respondent: *John Wray.*

C. L.

ELLEN SALMON, APPLICANT, *v.* MARIA MOLONY, RESPONDENT (1).

Supreme Court. 1924. Nov. 18.

Practice — Appeal — Town Tenants (Ireland) Act, 1906 (6 *Ed.* 7, *c.* 54), *sect.* 11 — *Appeal from award of Circuit Judge — Jurisdiction to hear appeal—Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 18, 22, 61.

A claim under the Town Tenants (Ireland) Act, 1906, was instituted on the 4th July, 1924, at which date there was no Circuit Court for the district in which the premises in question were situated. The claim was heard and an award made by the Circuit Judge subsequently appointed, on 1st October, 1924, whereupon the respondent appealed to the Supreme Court.

Held, that under sect. 61 of the Courts of Justice Act, 1924, the appeal should have been brought to two Judges of the High Court, and that no appeal lay to the Supreme Court.

This was an appeal to the Supreme Court by Maria Molony, the respondent in a claim under the Town Tenants (Ireland) Act, 1906, against an order of the Circuit Judge of the South-Western Circuit Court, Co. Clare, awarding the applicant a sum of £125 for compensation for disturbance. The applicant's claim was dated 4th July, 1924, at which date there was no Circuit Court of the district in existence; and the said award was made on the 1st October, 1924, by the Circuit Judge who had been appointed in the meantime.

Jellett K.C. (with him *J. Fitzgerald K.C.* and *Cullinan*), for the respondent in the appeal:—

We raise the preliminary objection that there is no jurisdiction to hear this appeal. No appeal lies to this Court from a decision of a Circuit Judge in civil cases. Under sect. 61 of the Courts of Justice Act, 1924 (2), this appeal should have been brought to two Judges of the High Court. It is only in case of a difference of opinion between such two Judges, or where they certify, as mentioned in the section, that an appeal lies to the

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

(2) Courts of Justice Act, 1924, sect. 61:—"Save as in this Act is otherwise expressly provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two judges of the High Court sitting in Dublin. If two such judges agree in their opinion, their decision shall be final unless they certify that their decision involves a question of law or fact of such importance as to be fit to be the subject of an appeal to the Supreme Court, in which case an appeal shall lie at the instance of any party from the decision of such two judges to the Supreme Court. If such two judges differ in their opinion, they shall affirm with costs the judgment or order appealed against, and an appeal shall lie at the instance of any party from such affirmance to the Supreme Court. The appeal under this section shall be on law and fact or upon either, save that where the appeal from the exercise by the County Court of any particular statutory jurisdiction transferred by this Act to the Circuit Court is expressly or by implication limited by statute to an appeal on questions of law, the appeal from the exercise of that jurisdiction by the Circuit Court shall be similarly limited."

Supreme Court. 1924.

SALMON v. MOLONY.

Supreme Court. [He referred to *Colonial Sugar Refining Co.* v. *Irving* (1).]

Phelps K.C. (*Macrory* with him), for the appellant:—

This claim was instituted on the 4th July, 1924, when no Circuit Court for Clare was in existence. Accordingly, under sect. 22 of the Courts of Justice Act, 1924 (2), the former right of appeal continues to exist.

[Sect. 18 of the Act was also referred to (3).]

The Supreme Court held that the preliminary objection must prevail, and dismissed the appeal.

Solicitor for Maria Molony: *M. J. MacNamara.*
Solicitors for Ellen Salmon: *James Lynch & Co.*

R. ST. J. C.

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(1) [1905] A.C. 369.

(2) Sect. 22:—"The jurisdiction vested in and transferred to the High Court and the Supreme Court and the Chief Justice respectively shall be exercised so far as regards pleading, practice and procedure generally, including liability as to costs, in the manner provided by such rules of court as may be made pursuant to this Part of this Act, and where no provision is contained in any such rules of court and as long as there shall be no rule with reference thereto, it shall be exercised as nearly as possible in the same manner in which it might have been exercised by the respective courts from which such jurisdiction shall have been transferred, by this Act."

(3) Sect. 18:—"The Supreme Court shall be a superior court of record with such appellate jurisdiction as is prescribed by the Constitution, and, subject as in this Act is provided, there shall be transferred to the Supreme Court the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by the existing Court of Appeal of the Supreme Court of Judicature in Ireland or any judges or judge thereof."

BARTON *v.* HARTEN (1).

K. B. Div. 1924. Jan. 18, 25.

Trade union—Trade dispute—Workman arrested by Government Forces—Refusal of employer to reinstate the workman when released—Absence of trade dispute—Picketing of premises—Trades Disputes Act, 1906 (6 *Ed.* 7, *c.* 47), *sect.* 5, *sub-s.* 3.

A publican's assistant was arrested by Government Forces and imprisoned by the Executive Government for a period of about twelve months. On his release his union demanded his reinstatement. This demand having been refused, the union withdrew the other assistants, and picketed the premises. The defendant, who was one of the picket, having been arrested and charged before the magistrate, the latter held that there was no "trade dispute" within the meaning of 6 Ed. 7, c. 47, sect. 5, sub-s. 3, and convicted the defendant and fined him ten shillings.

On appeal from the conviction by way of case stated:

Held, that the magistrate was right in his decision.

Observations by Lord Loreburn L.C. in *Conway* v. *Wade,* [1909] A. C. 506, applied.

CASE STATED.

Appeal, by way of case stated, in a matter of a complaint wherein Sergeant John Barton, of the Dublin Metropolitan Police, was complainant and Francis Harten was defendant, from a decision of Mr. Edmund Lupton K.C., one of the Divisional Justices of the Police District of Dublin Metropolis.

The case was stated for the opinion of the King's Bench Division, at the instance of the said Francis Harten pursuant to the provisions of 20 & 21 Vict. cap. 43.

At a sitting of the Dublin Metropolitan Police Court on the 12th day of November, 1923, before the said Divisional Justice, the said Francis Harten was charged in and by a certain summons for that he on the 7th day of November, 1923, at 68 Upper Dorset Street, within the Police District of Dublin Metropolis, with a view to compel Patrick Hogan, publican, 68 Upper Dorset Street, to abstain from doing an act which he had a legal right to do, viz.: to carry on his business at said premises, and also to compel persons from entering therein, did wrongfully and without legal authority watch and beset said above-mentioned premises by walking on the carriageway in front of the shop distributing handbills directing persons not to support said shopkeeper, and calling out: "Strike on here," there being no trade dispute between the said Patrick Hogan and his employees. And the said parties being then present, the said summons was part heard, and the further hearing was adjourned until the 14th day of November, 1923, when, the parties being then present, the hearing was resumed and finished, and the Divisional Justice ordered that the said defendant should pay for penalty the sum of ten shillings for that the said defendant, with a view to compel the said Patrick Hogan to abstain from carrying on his business at his said business premises until he

(1) Before MOLONY C.J., DODD and SAMUELS JJ.

K. B. Div. 1924.

BARTON v. HARTEN.

reinstates one Robert Cullen, a former employee, wrongfully and without legal authority did watch the business premises of the said Patrick Hogan on the 7th day of November, 1923.

The case stated set out the following facts, which were either proved or admitted:—

"1. On and prior to the 22nd day of October, 1922, the said Robert Cullen was employed from week to week as a publican's assistant by the said Patrick Hogan, who was then, and still is, a publican carrying on business at 68 Upper Dorset Street.

"2. On the said 22nd day of October, 1922, the said Robert Cullen was arrested by the Government forces, and imprisoned by the Executive Government, and kept in prison until the 29th day of September, 1923.

"3. Since the date of his arrest and imprisonment no communication of any kind passed between the said Robert Cullen and the said Patrick Hogan, save as appears in paragraph 4 hereof, and the said Robert Cullen has not since then worked for the said Patrick Hogan, but the said Patrick Hogan kept open for the said Robert Cullen until the month of January, 1923, the position which the said Robert Cullen held at the date of his arrest.

"4. On the 1st day of October, 1923, the said Robert Cullen called at the place of business aforesaid of the said Patrick Hogan and demanded reinstatement in the position which he had held prior to and at the time of his arrest as aforesaid, and the said Patrick Hogan refused to reinstate the said Robert Cullen stating, as was, and is, the fact, that the said position had been, and was then, filled. The said Robert Cullen persisted, and still persists, in his demand for reinstatement.

"5. The said Robert Cullen was at the time of his arrest, has been continuously since, and now is a member of the 'Irish National Union of Vintners', Grocers', and Allied Trades' Assistants.'

"6. The correspondence, which is to be considered as embodied in this case, passed between one Patrick Hughes, as Secretary of said Union, and the said Patrick Hogan. Before the said correspondence commenced the said Patrick Hughes called on the said Patrick Hogan and demanded the reinstatement of the said Robert Cullen, and the said Patrick Hogan again refused to reinstate him.

"7. On the 6th day of November one Eamonn Cooney, the President of the said Union, entered the said business premises of the said Patrick Hogan, and called out all the employees of the said Patrick Hogan, alleging a trade dispute, and the said employees then left the employment of the said Patrick Hogan, and have not since re-entered it with the exception of an apprentice.

"8. On the date mentioned in the last preceding paragraph

hereof, when the said Eamonn Cooney so entered the said business premises, there was in fact no dispute of any kind, and there is not now any dispute, between any of the employees so called out as aforesaid and the said Patrick Hogan; and since they have been called out the employees have refused to picket, and have not in fact picketed, the business premises of the said Patrick Hogan.

"9. On the 7th day of November, 1923, the said Union, alleging that it did so in furtherance of a trade dispute, placed a picket of members of the said Union in front of the said premises and the said picket walked on the carriageway in front of the said premises, and the members of it distributed handbills directing persons not to support the said Patrick Hogan, and called out at intervals when customers were entering, or about to enter, said business premises: 'Strike on here.' [A copy of one of the said handbills was exhibited, and is referred to in the judgment of Molony C.J.]

"10. The defendant is a member of the said Union and was a member of said picket and distributed said handbills."

The Divisional Justice found in law, or as mixed fact and law:—

(*a*) That there was not at any time since the 29th day of September, 1923, a trade dispute within the meaning of sect. 5, sub-s. 3, of the Trades Disputes Act, 1906 (6 Ed. 7, c. 47), in which the said Patrick Hogan was involved.

(*b*) That the said defendant, with a view to compel the said Patrick Hogan to abstain from carrying on his business at his said business premises until he reinstates the said Robert Cullen, wrongfully and without legal authority did watch the business premises of the said Patrick Hogan on the said 7th day of November, 1923.

And the judgment of the High Court of Justice was requested as to whether the Divisional Justice was correct in point of law in his determination, or as to what should be done in the premises. The case stated was dated the 20th day of November, 1923.

Sergt. Hanna K.C. and *M. Maguire*, for the defendant and appellant.

T. Sullivan K.C. and *J. O'Byrne*, for the complainant and respondent.

Vincent Rice, for Patrick Hogan and for the Licensed Grocers' and Vintners' Trade Protection Association.

Cur. adv. vult.

Jan. 25.

MOLONY C.J.:—

Prior to the 22nd October, 1922, a man named Robert Cullen was employed by Patrick Hogan from week to week as an assistant in the licensed premises, owned by Hogan, at 68 Upper Dorset Street. On that date Cullen was arrested by the Government forces, and imprisoned by the Executive Govern-

K. B. Div. 1924.

BARTON v. HARTEN.

Molony C.J.

ment, and so remained until the 29th September, 1923. During that period no communication of any kind passed between Cullen and his employer, but Hogan kept the place open for him until the month of January, 1923. On the 1st October, 1923, Cullen came to Hogan and demanded reinstatement in the position, which he had held prior to, and at the time of his arrest, which demand Hogan refused to grant, as the position had been, and was then, filled. This refusal was followed by a demand in writing, dated 29th October, from the Secretary of the Irish National Union of Vintners', Grocers', and Allied Trades' Assistants, demanding reinstatement, to which Mr. Hogan replied on the 31st October stating that he had no vacancy, being fully staffed. The General Secretary replied on the 1st November that unless the demand was complied with on or before Monday, the 5th November, the staff, who were members of the Union, would be withdrawn on that date.

Mr. Hogan not having taken any notice of this letter on the 6th November, Eamonn Cooney, the President of the Union, entered Mr. Hogan's premises, and called out all the employees of the said Patrick Hogan, alleging a trade dispute; but it is found in the case that at the time when Eamonn Cooney so entered the premises there was in fact no dispute of any kind existing.

On the following day the Union placed a picket in front of the business premises, distributing a handbill, which contained the following words:—

> "Refuse to support an employer who has refused to reinstate a member of his staff who was arrested and released without charge or trial."

The defendant was a member of the Union and belonged to the picket and was a member of the picket and distributed the handbills.

In these circumstances the learned Magistrate found that there was not at any time since the 29th September, 1923, a trade dispute within the meaning of sect. 5, sub-s. 3, of the Trades Disputes Act, 1906 (6th Ed. 7, c. 47), in which the said Patrick Hogan was engaged; and the question which we are asked is, whether he was correct in point of law in his determination.

We are bound by the findings of fact by the Magistrate, and, as it was pointed out by Campbell C.J. in *M'Cusker* v. *Smith* (1), we have no jurisdiction to interfere unless it appears from the case itself that the Magistrate acted without evidence, or that his decision was wrong in point of law.

In the present case it seems to me that there was ample evidence to sustain the Magistrate's finding that there was no trade dispute.

(1) [1918] 2 I. R. 432.

"Trade dispute" is defined in sect. 5, sub-s. 3, of the Trades Dispute Act, 1906, to mean "any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person," but I rather agree with the observations of Lord Loreburn in *Conway* v. *Wade* (1), where he said, referring to this definition: "I do not know that the definition is of much assistance. If this section is to apply there must be a dispute, however the subject matter of it be defined. A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance."

In this case Mr. Hogan was carrying on his business in the ordinary way, and had no dispute whatever with his employees. Cullen had left nearly a year before, and after an interval his position had been filled. The Union demands that he shall reinstate a person in his employment, and the reason given is that the man had been arrested and released without charge or trial. The Magistrate was of opinion that this was not in any sense a trade dispute, and there is no doubt that upon the evidence he was quite at liberty to so find.

Lord Loreburn, in the same case, after pointing out how a dispute may arise, says (at p. 512): "If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was in contemplation or in furtherance, not of the trade dispute, but of his own designs, sectarian, political, or purely mischievous, as the case might be."

These observations apply to a case where there is a genuine trade dispute but which is taken advantage of for an improper purpose, and they are still more strongly applicable to a case like the present where there is, in reality, no dispute at all, but only an attempt on the part of an organization to compel an employer to give employment to one who has been out of his employment for a long time and whose position has been filled in the ordinary course.

My opinion is that the finding of the Magistrate was right, and we shall answer the question in the affirmative.

DODD AND SAMUELS JJ. concurred.

Solicitors for defendant and appellant: *James O'Connor & Co.*
Solicitor for complainant and respondent: *The Chief State Solicitor.*
Solicitor for Patrick Hogan and for the Licensed Grocers' and Vintners' Trade Protection Association: *Thomas V. Davy.*

T. C. T.

(1) [1909] A. C. 506, at p. 509.

Supreme Court 1924.

Oct. 31. Nov. 3.

WILLIAM BOLGER, Plaintiff; CHARLES P. DALY, Defendant (1).

(1924. No. 3846.)

Landlord and tenant—Whether dwelling-house one to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied—Determination of "Standard Rent"—Evidence—Onus of proof as to letting of dwelling-house—Claim for increased rent—No notice to quit or notice of increase of rent served—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), sects. 1, 3, and 12, sub-sects. 1, 2, and 9.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), sect. 12 (1), provides: "For the purposes of this Act, except where the context otherwise requires:—

(*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let."

By sub.-sect. (2) the Act applies to a house where either the annual amount of the standard rent or the rateable value does not exceed, in Ireland, £78.

A landlord sued his tenant for the rent of a dwelling-house, and the tenant's defence was that portion of the rent claimed was irrecoverable by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenant proved that the dwelling-house was let to him on 1st November, 1918, at a rent of £50 per annum, the landlord giving the tenant possession on that day, the dwelling-house being then vacant. No evidence of any other letting was given by either landlord or tenant, and there was no evidence as to the rateable value of the house. The rent was subsequently increased, but no notice to quit was served, nor was any notice of increase of rent served by the landlord on the tenant pursuant to the provisions of sect. 3, sub-sect. (2) of the Act. The tenant paid the increased rent for some time. For the tenant it was contended that his evidence as to the letting on 1st November, 1918, was sufficient to show that the dwelling-house was one to which the Act applied, and that, accordingly, the increase of rent was irrecoverable. For the landlord it was contended that as the tenant's defence was that the house was one to which the Act applied, the onus lay on the tenant to prove that defence, and that he had not done so, as the standard rent was the rent at which the dwelling-house was let on the 3rd day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, and the tenant had given no evidence as to any such lettings, and, moreover, that it was only in the case of a house which was first let after the 3rd day of August, 1914, that the rent of a letting made subsequent to that date was the standard rent, and the tenant had not proved that the letting of 1st November, 1918, was the first letting of the house.

Held, reversing Johnston J., that the evidence of the tenant was sufficient to prove that the dwelling-house was one to which the Act applied, and, accordingly, that the increase of rent was irrecoverable by the landlord.

(1) In the Supreme Court, before Kennedy C.J., O'Connor and FitzGibbon JJ.

NEW TRIAL MOTION.

Appeal by the defendant from an order made by Johnston J. at the trial of the action, giving judgment for the plaintiff for £75 and costs, and dismissing the defendant's counterclaim. The defendant asked that judgment might be entered for the plaintiff for £41 13s. 4d. only, and that judgment be entered for him on his counterclaim for £60, or, in the alternative, that a new trial of the action might be ordered.

The action was brought for the recovery of £75, being ten months' rent from June 1st, 1923, to March 1st, 1924, due by the defendant to the plaintiff in respect of the premises, 44 Chamber Street, Dublin, held under an agreement of tenancy, made verbally, between the plaintiff and the defendant in the month of December, 1921, whereby the plaintiff let and the defendant took the premises on a yearly tenancy at the rate of £7 10s. per month.

The defendant in his defence denied the agreement of December, 1921, and pleaded that he held the premises from the plaintiff under a written agreement of November 1st, 1918, whereby he became tenant to the plaintiff for a term of at least one year, at the yearly rent of £50, payable at the rate of £4 3s. 4d. per month. The defence also stated that in the month of December, 1921, the plaintiff verbally agreed with the defendant's wife, without the knowledge or consent of the defendant, to carry out certain structural alterations in part of the premises, in order to make it suitable as a butcher's shop, and that the defendant's wife agreed to pay the plaintiff's costs of the alterations at the rate of £3 6s. 8d. per month. The last of these instalments was paid on May 1st, 1923. The verbal agreement did not alter, nor did it profess to alter, the contract of tenancy of November 1st, 1918. The defendant tendered to the plaintiff £41 13s. 4d., ten months' rent from June 1st, 1923, to March 1st, 1924, before action brought, and in pursuance of an order of the Court of April 8th, 1924, he lodged £60 in Court. In the alternative, the defendant said that no notice to quit and no notice of increase of rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, were served on him by the plaintiff, and that the increased rent demanded was irrecoverable under the said Act. By way of counterclaim, he said that he had paid to the plaintiff the sum of £60 in respect of increase of rent, which was made void by the Acts, and he counterclaimed for that amount.

In his reply, the plaintiff stated that in November, 1921, in pursuance of an agreement in that behalf made, and at the defendant's request, he reconstructed the house and premises, built additions thereto, and constructed a shop, and that it was part of the terms of the agreement that, in consideration of such reconstruction, additional building, and construction of the shop, the defendant, in lieu of his then existing tenancy,

Supreme Court. 1924.

BOLGER v. DALY.

should take a yearly tenancy from the plaintiff at a monthly rent of £7 10s. That the plaintiff accepted the surrender of the prior tenancy, and performed the agreement on his part, and the defendant accepted the new tenancy. And that the defendant at all times held out his wife as his agent in dealing with the plaintiff.

The case was tried before Johnston J. without a jury on July 9th, 1924. The plaintiff, in the course of his evidence, deposed that, at the request of Mrs. Daly, wife of the defendant, acting for her husband, he reconstructed and altered the premises on the understanding that in consideration for such work the rent in future was to be £7 10s. per month. Charles Daly, the defendant, deposed that the cost of the repairs made by the plaintiff would be about £20. Mrs. Daly's evidence was to the effect that she had no authority from her husband to arrange any rent. She told the plaintiff that if he put up a temporary roof she would see that he was at no loss.

On August 1st, 1924, Johnston J. gave judgment in favour of the plaintiff on the claim for £75, and for the plaintiff on the counterclaim with costs, and ordered that the sum of £60 lodged in Court be paid out to the plaintiff in part satisfaction of his demand. Referring to the defence under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the learned Judge said that the basis of such a defence should rest upon proof of what was the standard rent. There was not sufficient evidence in the case of what it was, and he had not before him the materials for affording to the defendant any relief by virtue of that Act.

Phelps K.C. and *Moonan* for the appellant :—

The tenancy of November 1st, 1918, still continues, and the rent payable under it is the standard rent under sect. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), which is the statute applicable in this case, and, accordingly, the Act applies to these premises. The plaintiff cannot succeed, as he did not displace the *prima facie* case made by the appellant that the premises were within the Act. And as the plaintiff did not serve a notice to quit or a notice to increase the rent as provided by the Act, the increased rent is irrecoverable: *Kerr* v. *Bryde* (1), *Schmit* v. *Christy* (2), *Michael* v. *Phillips* (3).

Rice K.C. and *Corbett* for the respondent :—

The onus of proving that premises come within the Act rests upon the person who seeks to avail himself of the provisions of the statute. Evidence by the tenant that the premises were let to him in 1918 at £50 a year is not proof that the dwelling

(1) [1923] A. C. 16. (2) [1922] 2 K. B. 60. (3) [1924] 1 K. B. 16.

was subject on August 3rd, 1914, to a standard rent within the operation of the Act. Section 12, sub-sect. (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "the expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let." Evidence of a letting in 1918 at £50 a year could not be accepted as proof of a standard rent, unless the tenant had first shown that the house was not let on August 3rd, 1914, or at an earlier date, or that the house was first let when it was let in 1918. The defendant, therefore, failed to discharge the onus that lay upon him of proving that the Act applied to the dwelling-house. The tenant could, under sect. 11 of the Act, have compelled the landlord to supply him with a statement in writing as to what was the standard rent. [Authorities cited: *Abrath* v. *North Eastern Railway Company* (1), *Doe, dem., Bridger* v. *Whitehead* (2), *Salter* v. *Lask* (3), Taylor on Evidence, 10th edition, vol. I, page 283.]

Moonan, in reply.

KENNEDY C.J.:—

This action was brought to recover rent claimed at the rate of £7 10s. a month from June 1st, 1923, to March 1st, 1924, in respect of premises situate at Chamber Street, in the City of Dublin.

Several matters were discussed at the trial, which took place before Johnston J. without a jury, but of these only one is practically in issue on this appeal.

The defendant first became tenant of the premises on November 1st, 1918, at a rent of £50 per annum. The plaintiff's claim is based upon an increased rent, and the defendant's answer is that the increase was prohibited by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17)—the statute in operation at the time the increase was imposed.

In the action, as it developed originally, the increase was attributed to a contract between the parties with reference to certain alterations and the reconstruction of the demised premises, and the question was discussed whether the defendant's wife was his agent for the purpose of entering into that contract. For our purpose, it is not necessary to consider any question save the validity in law of the plaintiff's claim, in so far as it is a claim for increase of rent—an increase which,

(1) 55 L. J. Q. B. 457. (2) 8 Ad. & E. 571. (3) [1924] 1 K. B. 754.

Supreme Court.
1924.
BOLGER v. DALY.
Kennedy C.J.

admittedly, was not preceded by the notice required by the Act of 1920 to be served in the case of a house to which that Act applied. The narrow question for us, then, is whether, on the evidence, the premises can be regarded as premises to which the Act of 1920 applied.

The application of the Act depends on whether the standard rent or the valuation is within the maximum limit prescribed by the statute in defining the premises to which it applies. No evidence as to valuation is before this Court, nor was any such evidence given before Johnston J.; and the case is, therefore, further narrowed down to a question as to whether there is evidence that the standard rent was such as to bring the premises within the Act.

The letting to the defendant was proved. Under that letting he was given vacant possession on November 1st, 1918, and he was to hold from that date at a rent of £50 a year. If that figure represent the standard rent, the tenancy was within the Act. No evidence as to any previous letting of the premises having ever been made was given on the part of either party. It was contended on the part of the plaintiff that the onus was upon the defendant of showing whether or not the premises were let on August 3rd, 1914, and, if not then let, when they were first let after that date, and whether such letting was at a rent within the prescribed limits of application of the statute, and, if so, what was the amount of the standard rent according to the definition in the statute.

Now, on the evidence before the Court in this case, we find a letting of the premises made on November 1st, 1918, which, no earlier letting having been proved, appears to be a first letting, and at a rent within the limits of application of the Act which gives us the statutory "standard rent." In my opinion, in that state of facts, the onus rested on the plaintiff to displace the *primâ facie* case made by the defendant bringing the premises within the Act. No attempt has been made by the plaintiff to displace that *primâ facie* case. We must, therefore, assume that the premises were let at a standard rent within the Act, namely, £50 a year, from which it follows that the decision of the learned Judge at the trial cannot be sustained. In the circumstances, any increase in the rent above £50 is not recoverable by the plaintiff.

Our order will be that judgment be entered for the plaintiff on his claim for £41 13s. 4d., without costs, and judgment for the defendant on the counterclaim for the sum of £60, without costs of the counterclaim, but with the cost of this motion. As the defendant lodged £60 in Court which the plaintiff has drawn out, the plaintiff must lodge in Court to the credit of this action the sum of £18 6s. 8d., the difference between the two sums of £41 13s. 4d. and £60.

O'CONNOR J.:—

I concur. The defendant brought himself within the Act, and sufficiently discharged the onus upon him when he gave evidence of the letting on November 1st, 1918. It is perfectly plain from that agreement that on, and previous to, that date the premises were vacant. Once an existing state of facts is proved, these facts will be presumed to have existed and continued until there is evidence to the contrary limiting the period of time. That being so, we must presume, in the absence of evidence by the plaintiff, that the premises were let at £50 a year, which brings the case within the Act.

FITZGIBBON J.:—

I concur. I do not think that the plaintiff ever raised or intended to raise the question whether the premises were within the Act. In his reply, the plaintiff pleads that at the defendant's request he "reconstructed" the house, with the object of showing that premises, to which the prohibitions against increase of rent and recovery of possession would otherwise apply, were excluded from the Act by sect. 12, sub-sect. (9). The technical expression "reconstruct" is used throughout the evidence of the plaintiff, and this shows that the issue was whether the agreement relied upon by the plaintiff was one made in consequence and consideration of a reconstruction by which the provisions of the Act were excluded, or whether it was an agreement for a new tenancy upon, and in consideration of, the surrender of the old one. Upon both these issues the plaintiff has failed. It is admitted that no notice to quit was served. In these circumstances an increase in rent is not recoverable in respect of premises within the Act.

Solicitor for the appellant: *John Moran.*
Solicitors for the respondent: *M. S. Bergin & Co.*

C. L.

High Court. 1925.

Jan. 21.

W. F. PHILIPS (Inspector of Taxes), Appellant; MICHAEL J. KEANE, Respondent (1).

Revenue — Income tax — Deduction — Holder of an office or employment of profit—Expenses incurred and defrayed out of emoluments—Travelling expenses—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule E., r.* 9.

The Income Tax Act, 1918, Schedule E, r. 9, provides:—"If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred or defrayed."

Respondent, who was the principal of a National School situated at C., in the County of Clare, could not procure a suitable residence at C. or within a radius of five miles therefrom. He therefore resided at K., about five miles from C. He was not physically strong, and the road from K. to C. is rough and hilly and difficult to cycle. He was therefore obliged to keep a pony and trap, and to employ a man for the purpose of getting from his residence at K. to the National School at C. and back, at an expense of £60 a year, £40 of which he claimed as a deduction. He contended that he was "necessarily obliged to incur and defray out of the emoluments" of his office or employment as principal of the National School the sum of £40 a year as "expenses of travelling in the performance of the duties of the office or employment." The Special Commissioners, on appeal, were of opinion that the expenditure was not allowable; but, in deference to a previous decision of the County Court Judge of Clare, who allowed a similar claim by the respondent for the previous year, they allowed the appeal.

Held, on a case stated for the High Court, that the expenses in question were not incurred in the performance of the duties of the office, and that the deduction claimed was not allowable.

Case stated under the Income Tax Act, 1918, sect. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice. The case stated was as follows:—

"1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on the 21st January, 1924, at Kilrush, for the purpose of hearing appeals, Michael J. Keane, hereinafter called the respondent, appealed against assessments made upon him under Schedule E. of the Income Tax Act, 1918, for the years of assessment, 1922-23 and 1923-24, on the ground that travelling expenses incurred and defrayed by him in each of these years had not been deducted from the emoluments to be assessed.

"2. Respondent is a National School teacher, being the principal of the Corbally National School, Kilkee, Co. Clare.

"3. Respondent resides at Kilferagh, which is about five or six miles distant from Corbally National School.

"4. Respondent could not procure a suitable residence at Corbally, or within a radius of five miles from the school-house.

(1) Before Sullivan P., O'Shaughnessy and Murnaghan JJ.

"5. Respondent is not physically strong, and the road from Kilferagh to Corbally National School is rough and hilly and difficult to cycle.

"6. Respondent is obliged to keep a pony and trap, and to employ a man for the purpose of conveying him from his residence at Kilferagh to Corbally school-house and back, at an expense of £60 a year, £40 of which is claimed as a deduction.

"7. Respondent contended that he 'is necessarily obliged to incur and defray out of the emoluments' of his office or employment as National School teacher the sum of £40 a year as 'expenses of travelling in the performance of the duties of the office or employment,' and that for each of the years of assessment, 1922–23 and 1923–24, there should be deducted from his emoluments to be assessed a sum of £40, being part of the annual expense of £60 above-mentioned.

"8. The Inspector of Taxes resisted this contention as being unsustainable in point of law.

"9. We, the Commissioners who heard the appeal, were of opinion that the said expenditure of £40 was not allowable as a deduction under r. 9 of Schedule E. of the Income Tax Act, 1918, or otherwise; but, in deference to a previous decision of the Judge of the County Court of Clare, who allowed a similar claim of the respondent for the year of assessment 1921–22, we allowed the appeal for each of the years 1922-23 and 1923–24.

"10. The appellant, immediately upon the determination of the appeal, declared to us his dissatisfaction therewith, as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court, pursuant to the Income Tax Act, 1918, sect. 149, which case we have stated, and do sign accordingly.

"11. The question for the decision of the High Court is whether the said sum of £40 is allowable as a deduction under the rules of Schedule E. of the Income Tax Act, 1918."

Costello (with him *S. L. Brown K.C.*), for the appellant:—

This is not one of the expenses of travelling contemplated by rule 9 of Schedule E. of the Income Tax Act, 1918. The respondent is not "necessarily obliged" to incur it, nor is it expended "wholly, exclusively, and necessarily" in the performance of the duties of his office: *Ricketts* v. *Colquhoun* (1); *Andrews* v. *Astley*, unreported (2); *Friedson* v. *Glyn-Thomas* (3).

There was no appearance for the respondent.

(1) [1924] 2 K. B. 347.

(3) [1922] W.N. 251.

(2) *Andrews* v. *Astley* was decided by Rowlatt J. in the King's Bench Division in England on February 27th, 1924. A storekeeper employed by a shipbuilding company in Bideford contended that, owing to the abnormal shortage of houses in that town, he was compelled to take a house at some distance outside, and claimed to deduct from his salary the expenses of maintaining a motor cycle to get to his work. The General Commissioners, on appeal, allowed the deduction claimed. Rowlatt J. reversed this decision, and held that the deduction claimed was not allowable. (Reports of Tax Cases, vol. viii, p. 589, printed for official use.)

TRIN. COLL. DUBL. UNIV.

High Court.
1925.
PHILIPS v KEANE.

SULLIVAN P.:—

We do not think that the expenses in question here were incurred in the performance of the duties of the respondent's office. His case is therefore not within r. 9 of Schedule E. of the Income Tax Act, 1918. The deduction claimed is therefore not admissible. We answer the question put to us in the negative. We will make no order as to costs.

O'SHAUGHNESSY and MURNAGHAN JJ. concurred.

Solicitor for the appellant: *Solicitor of Revenue.*

H. H.

IN THE MATTER OF MOSES STEWART, A BANKRUPT (1).

Supreme Court.
1924.
Oct. 29, 30.
Dec. 9.

Land Purchase Acts — Holding subject to land purchase annuity — Restriction on mortgaging or charging — Charge in excess of permitted amount—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 54, *sub-s.* 3—*Repeal of restriction by the Land Act,* 1923 (*No.* 42 *of* 1923), *sect.* 78—*Effect of repeal—Repeal not retrospective—Interpretation Act,* 1889 (52 & 53 *Vict. c.* 63), *sect.* 38, *sub-s.* 2 (*a*), (*b*), (*c*)—*Vendor's lien—Other security taken—Abandonment of lien.*

Sect. 54, sub-s. 3, of the Irish Land Act, 1903 (3 Ed. 7, c. 37), provides that the proprietor of a holding, for the purchase of which the Land Commission have made an advance under the Land Purchase Acts, shall not, without the consent of the Land Commission, mortgage or charge the holding for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity, and that every instrument of mortgage or charge by which the holding is charged with any larger sum shall be null and void as to the excess. By sect. 78 of the Land Act, 1923 (No. 42 of 1923), passed on August 9th, 1923, sect. 54, sub-s. 3, of the Irish Land Act, 1903, is repealed.

In 1921 the purchaser of three farms, of which one was held under a fee-farm grant, and the other two had been purchased under the Land Purchase Acts, and were held subject to Land Purchase annuities aggregating £14 5s. 4d., paid therefor £560 in cash, and the balance of the purchase-money, amounting to £950, was secured, as to £550 thereof by a mortgage on the farm held under the fee farm grant, and as to the remaining £400 by a charge on the two farms held subject to the Land Purchase annuities. On October 31st, 1923, the purchaser was adjudged bankrupt. On January 2nd, 1924, the vendors, acting under their powers of sale as mortgagees, sold the three farms for £950, and appropriated £400 in satisfaction of their charge on the two farms subject to the Land Purchase annuities. It was submitted by the Official Assignee in Bankruptcy that, as regards the charge for £400, the vendors were entitled to retain only £142 13s. 4d., a sum representing ten times the amount of the annuities. On behalf of the vendors it was contended that the repeal effected by the Land Act, 1923, removed the restriction on the amount of their charge, and that they were entitled to retain the full amount. Alternatively, they relied upon a vendor's lien.

Held (affirming Murnaghan J.), that the instrument of charge being, by virtue of sect. 54, sub-s. 3, of the Irish Land Act, 1903, null and void from the moment of its creation as to the excess over the permitted amount, the repeal of that sub-section by sect. 78 of the Land Act, 1923, did not make valid the charge for such excess.

Held also that the effect of sect. 54, sub-s. 3, of the Irish Land Act, 1903, upon the vendor's charge was preserved by sect. 38, sub-s. 2, of the Interpretation Act, 1889.

Held further, that the transaction did not give rise to a vendor's lien for unpaid purchase money. And that even if this view were incorrect, the vendors, by taking the mortgage securities, evidenced their intention of abandoning their lien.

Accordingly the vendors were only entitled to a valid charge for £142 13s. 4d. on the farms subject to the Land Purchase annuities, and they were ordered to lodge with the Official Assignee in Bankruptcy the balance of their charge for £400.

APPEAL from an order made by Murnaghan J. on July 18th, 1924, by which he held that the appellants' charge on certain registered lands was subject to the restriction contained in sect. 54, sub-s. 3, of the Irish Land Act, 1903 (3 Ed. 7, c. 37).

The appellants, William Allison and Robert J. Allison, had been the owners of three farms of land in Derryvane, County

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Supreme Court. 1924.

In re STEWART.

Donegal. One of the farms, containing 27 A. 3 R. 27 P., was held under a fee-farm grant at the yearly rent of £14 1s. 3d. The other two farms were held in fee-simple subject to annuities payable to the Irish Land Commission. One of these farms contained 15 A. 3 R. 30 P. and was subject to an annuity of £7 14s. 8d.; the other contained 14 A. 3 R. 30 P. and the annuity was £6 10s. 8d.

On November 4th, 1921, Moses Stewart purchased the three farms from the appellants for a bulk sum of £1,510. The purchaser paid £560 in cash, leaving the balance of £950 to remain outstanding on the security of a mortgage and a deed of charge on the purchased lands. This £950 was apportioned by securing £550 thereof by a mortgage on the lands held under the fee-farm grant and £400 by a charge on the lands which were subject to the Land Purchase annuities.

On October 31st, 1923, Moses Stewart was adjudged bankrupt on his own petition. On January 2nd, 1924, the appellants, acting under their powers of sale as mortgagees, sold all the three farms of land by public auction for the sum of £950. The Official Assignee submitted that as to £400, part of the proceeds of the sale, being the amount appropriated and retained by the appellants in satisfaction of their charge on the two farms which were subject to the Land Purchase annuities, they were only entitled to a valid charge on these lands for £142 13s. 4d., a sum representing ten times the combined amounts of the two purchase annuities, and that the balance should be made available for the benefit of the bankrupt's general estate. By motion dated July 5th, 1924, the Official Assignee asked the Court for a declaration to this effect. By his order of July 18th, 1924, Murnaghan J. made the declaration sought. The appeal was from that order.

Overend K.C. and *E. J. Kelly*, for the appellants:—

Sect. 54, sub-s. 3, of the Irish Land Act, 1903 (3 Ed. 7, c. 37), is repealed by sect. 78 of the Land Act, 1923 (No. 42 of 1923). As to the effect of a repeal where there is nothing in the repealing Act to show that it is retrospective, Lord Tenterden said, in *Surtees* v. *Ellison* (1): "It has been long established that when an Act of Parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed." Sect. 54, sub-s. 3, of the Irish Land Act, 1903, is obliterated as from the date of the repeal, August 9th, 1923: *Kay* v. *Goodwin* (2), cited with approval in *Lemm* v. *Mitchell* (3). The test in regard to time is the date of realization, and when the registered lands were sold the restrictive sub-section of sect. 54 of the Irish Land Act, 1903, was repealed.

Assuming that the repeal is not retrospective in its operation, we submit that under their lien as vendors, the appellants are entitled to the full amount of their charge. The lien was not

(1) 9 B. & C. 750, at p. 752. (2) 6 Bing. 576, at p. 582.
(3) [1912] A. C. 400.

lost by the creation of the charge; non-registration of the lien only affected priority as against a subsequent purchaser for value, and the Official Assignee in Bankruptcy is not such a purchaser. The question whether a lien is lost by taking another security depends upon the intention of the parties: Halsbury, Vol. 19, page 30, par. 47; *Mackreth* v. *Symmons* (1). A vendor's lien is outside the scope of sect. 54, sub-s. 3, of the Irish Land Act, 1903: *In re Roulston* (2); *National Bank* v. *Diffely* (3).

Blood K.C. and *J. Russell,* for the respondent, the Official Assignee:—

The repeal of sect. 54, sub-s. 3, of the Irish Land Act, 1903, by the Land Act, 1923, is not retrospective. Any Court will be slow to construe an enactment as retrospective unless Parliament has clearly said that the enactment is to be construed retrospectively: *Gardner* v. *Lucas* (4). The Interpretation Act, 1889 (52 & 53 Vict. c. 63), sect. 38, sub-s. 2, provides that any repeal by that Act or by any subsequent Act, unless the contrary intention appears, does not (*a*) revive anything not in force or existing at the time at which the repeal takes effect; or (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed. At the date of the registration of the charge, the transaction was null and void as regards the excess over ten times the annuity; and the repeal effected by the Land Act, 1923, cannot revive the charge for that excess.

The alternative point as to vendor's lien was not raised in the Court below, or in the notice of appeal; and we submit that the appellants are not entitled to rely upon it in this Court: Wylie's Judicature Acts, page 781; *Ex parte Reddish* (5). The appellants abandoned their lien when they accepted another security for payment of the outstanding purchase-money: *Bond* v. *Kent* (6).

[FitzGibbon J. referred to *Capper* v. *Spottiswoode* (7).]

Overend K.C., in reply—The conclusion arrived at in that case by the Master of the Rolls (Sir John Leach), that the lien was abandoned, must have been based on other facts not reported

Dec. 9.

KENNEDY C.J.:—

Moses Stewart, described as a farmer of Knowhead, Derryvane, in the County of Donegal, was, on the 31st day of October, 1923, adjudged bankrupt on his own petition. The Official Assignee in Bankruptcy is the respondent in this appeal.

(1) 15 Ves. 329.
(2) [1909] 1 I. R. 306
(3) [1910] 1 I. R. 271.
(4) 3 App. Cas. 582, at p. 590.
(5) 5 Ch. Div. 882.
(6) 2 Vern. 281.
(7) Taml. 21.

Supreme Court. 1924.

In re STEWART.

Kennedy C.J.

At the date of his said adjudication Moses Stewart was seised or possessed and in occupation of three parcels of land, viz.:—

(*a*) Part of the lands of Derryvane, in the Parish of Templemore, Barony of Inishowen and County of Donegal, containing 27 A. 3 R. and 27 P., Statute Measure, held under a fee-farm grant, dated the 20th February, 1900, from the Earl of Shaftesbury to William Allison and Robert James Allison, subject to the yearly fee-farm rent of £14 1s. 3d.

(*b*) Part of the said lands of Derryvane in the same Barony and County, containing 15 A. 3 R. and 30 P., Statute Measure, held in fee-simple, subject to a Land Purchase annuity of £7 14s. 8d., payable to the Irish Land Commission on foot of an advance made under the Irish Land Acts, 1903 and 1909, being the lands registered in the Land Registry of Ireland on Folio 8664, Register County of Donegal.

(*c*) Another part of the said lands of Derryvane, in the same Barony and County, containing 14 A. 3 R. and 30 P., Statute Measure, held in fee-simple, subject to a Land Purchase annuity of £6 10s. 8d., payable to the Irish Land Commission on foot of an advance made under the Irish Land Acts, 1903 and 1909, being the lands registered in the Land Registry of Ireland on Folio 8665, Register County of Donegal.

Moses Stewart acquired these three several parcels of land by purchase from William Allison and Robert F. Allison, the appellants in the present appeal, who were the previous owners of the lands. The purchase was a single transaction at a bulk price of £1,510, effected by a contract in writing, dated the 4th November, 1921. The contract follows the usual lines and provides for payment of the purchase-money in full.

For conveyancing purposes the parties apportioned the purchase-money between the lands held under the fee-farm grant and the registered lands. The two registered holdings were vested in Moses Stewart upon a single instrument of transfer, in which the consideration is stated to be £610, leaving the balance of £900 to appear as the consideration in the conveyance of the lands in the fee-farm grant. Moses Stewart was registered as owner of each of the two registered holdings on the 24th February, 1922.

In fact, however, it appears that the purchase price of £1,510 was not paid in full. Only the sum of £560 was actually paid in cash, leaving a balance of £950.

By a deed of mortgage, dated the 17th day of February, 1922, and registered in the Registry of Deeds on the 25th day of February, 1922, Moses Stewart conveyed to the appellants the lands comprised in the fee-farm grant by way of mortgage to secure the payment to the appellants of the sum of £550 with interest at the rate of six pounds per cent. per annum, reducible to five pounds per cent. on punctual payment. This deed contains no recitals nor any references to the purchase transaction.

On the 17th March, 1922, there was registered against each of the registered holdings a charge in favour of the appellants for the sum of £400 with interest at the rate of six pounds per cent. per annum, reducible to the rate of five pounds per cent. on punctual payment. The charge on the two holdings was created by a single instrument of charge, which is not forthcoming by reason of its destruction in the Four Courts during the disturbances of July, 1922. The date of execution of the deed of charge does not appear to be known to the parties.

On the 2nd of January of the present year, the appellants, purporting to act under their powers of sale as mortgagees, sold all three holdings in one lot by public auction for the sum of £950.

The solicitor for the Official Assignee thereupon communicated with the appellants, claiming that their charge on the registered lands was subject to the limitations contained in sect. 54, sub-s. 3, of the Irish Land Act, 1903, and that, therefore, the security of the appellants on the registered lands was only good to the extent of ten times the amount of the purchase annuities, or £142 13s. 4d. in all, with interest on that principal sum, and that the balance of the purchase-money, having regard to this statutory limitation, must be paid over to the Official Assignee for the benefit of the general estate of the bankrupt, Moses Stewart. The appellants did not accept this contention, whereupon the question was brought before the High Court by the Official Assignee, and an order was made by Murnaghan J., who decided that the appellants' charge on the registered lands was subject to the restrictions contained in sect. 54, sub-s. 3, of the Irish Land Act, 1903, that "as to the £400, part of the proceeds of said sale, being the amount thereof appropriated and retained by the said William Allison and Robert J. Allison in satisfaction of the said charge, they are only entitled to a valid charge on said lands for £142 13s. 4d., being a sum representing ten times the combined amounts of the said two purchase annuities." The learned Judge referred the matter to the Chief Registrar "to ascertain the amount for which the said William Allison and Robert J. Allison are (having regard to the statutory restriction aforesaid on the power of charging) to be regarded as secured creditors in respect of the said deed of charge over the said lands," and he ordered the appellants to bring in and lodge with the Official Assignee the balance of the said sum of £400 after deducting therefrom the amount ascertained to be due to them in respect of their said charge.

The appellants now ask to have that order reversed and that it may be ordered that they "as such mortgagees as aforesaid may be declared entitled to retain the whole of the proceeds of the sale of the said lands in respect of the indebtedness of the said Moses Stewart to the said William Allison and Robert J. Allison."

The appellants' case before Murnaghan J. rested on the

Supreme Court. 1924. *In re* STEWART. Kennedy C.J.

validity of the deed of charge free from the limitations imposed on charging by sub-s. 3 of sect. 54 of the Irish Land Act, 1903. There, the argument was that that sub-section has been repealed by sect. 78 of the Land Act, 1923 (No. 42 of 1923), passed by the Oireachtas on the 9th August, 1923, and that the repeal is retrospective in its operation. The statute does not expressly give the repeal retrospective effect, but I understand that it was argued that the context showed that the intention of the Oireachtas was that the repeal should have retrospective effect. The argument has not been put quite in that way here, and I have not had any assistance in finding, nor have I been able to find, any context in the Act which educes any such intention on the part of the Legislature. The way the effect of the repeal has been presented to us, however, was rather something like this: You have a continuing charge which up to a certain date is subject to a continuing restriction on its *quantum*. At a certain point of time, by means of a repeal, the statutory compression is released, and forthwith the charge swells out to the full extent of the borrowing it was created to secure. The first answer to this argument is that sect. 54, sub-s. 3, of the Act of 1903, declares the instrument of charge null and void as to the excess over the permitted amount of such security under that sub-section. So that, from the moment of its creation—such is the clear effect of the language used—the charge is actually only a charge for the permitted amount. It never had any existence, virtue, or validity beyond that. A repeal to operate retrospectively in the manner contended for, would not, having regard to the language used, be a negative act but a positive one, creating a charge where none existed. Something more than a bare repeal is required to produce such a result. There is really no difference between this contention and the case put forward unsuccessfully in *Gardner* v. *Lucas* (1). A moment's consideration will show the injustice which might be inflicted on third parties acting on the faith of the statutory position prior to the repeal if such a contention were to prevail. But when one turns to sect. 38, sub-s. 2, of the Interpretation Act, 1889, it is more than difficult to see how this case could stand for a moment. That sub-section enacts that where any Act is passed thereafter which repeals any other enactment, "then, unless the contrary intention appears, the repeal shall not (*a*) revive anything not in force or existing at the time at which the repeal takes effect; or (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or . . ." The repeal relied on, therefore, cannot affect the previous operation of sect. 54, sub-s. 3, of the Act of 1903, which made the charge null and void as to the excess over ten times the purchase annuity, or revive the charge for such excess which was not in force

(1) 3 App. Cas. 582.

or existing at the time of the repeal, or affect any right to redeem on payment of ten times the purchase annuity, and have the lands freed of the entire charge.

In this Court, however, another case has been made which was not made before Murnaghan J. Assuming the statutory limitation under the Act of 1903 to bind the charge and prevent the appellants from being paid under the charge more than the amount of ten times the purchase annuity, it is now contended that the appellants are entitled to a vendor's lien upon the same (the registered lands) for the balance of their original purchase-money which remains unpaid. It has been objected on the part of the Official Assignee that they should not be allowed to make this new case here, and in any case, it is argued, that the lien has gone, by waiver or surrender.

I have very great doubt whether we should have heard any argument from the appellants in support of a case of vendor's lien. It is certainly a complete afterthought, never mooted before their appearance in this Court. It was certainly as mortgagees under the registered deed of charge that they sold (upon conditions of sale requiring the purchaser to accept the Folio in the Land Registry as an abstract of title), and as such mortgagees that they claimed to retain the whole purchase-money against the Official Assignee in the High Court, and in their Notice of Appeal it is as such mortgagees, and only as such mortgagees, that they claim to retain the whole of the purchase-money. Strictly, therefore, it was not open to them, without leave, to take this wholly new ground in this Court, but in the result no harm is done, because the case so put forward has not been made good.

This part of the case has been argued solely as a question of abandonment of a vendor's lien, that is to say, on the assumption that at some point of time there was such a lien in existence. All the facts before us are contained in an affidavit filed on the part of the Official Assignee and the exhibits with it. The appellants have admitted the accuracy of the facts so stated. I have examined and considered these facts, and I have formed the conclusion that there never was any vendor's lien affecting these lands. The original transaction, as I read it, taking all the facts and dates into account, was a sale by the appellants to Moses Stewart in consideration of £560 paid in cash and two mortgage securities for £950. That transaction would not give rise to a lien of the kind assumed here.

If, however, I am wrong in this, the question becomes one of intention, namely, whether the appellants intended to preserve their lien or to abandon it, taking the mortgage securities in its place. I cannot find one single fact showing the appellants to have relied upon or to have held on to their vendor's lien. All through they appear as standing on their mortgage deeds and nothing else, and very definitely so in all the proceedings relating to the sale which they have now made of the lands, until, actually arrived in this Court, their counsel built up

Supreme Court. 1924.

In re STEWART.

Kennedy C.J.

for them a case in law which was far from their intention in fact, and, unfortunately for them, since they cannot supply the gap in intention, the legal ingenuity falls. In these circumstances it is not really necessary to go through the cases where, in the absence of facts outside the instruments executed, inferences have been drawn from the nature of the transactions evidenced by the instruments. I will only say that they would have a good deal of difficulty in getting over cases of the type of *Capper* v. *Spottiswoode* (1) referred to by FitzGibbon J. in the course of the argument.

For these reasons I am of opinion that this appeal should be dismissed with costs.

O'CONNOR J.: I concur.

FITZGIBBON J.:—

The material facts upon which the decision in this case turns are not in dispute, and are fully stated in the affidavit of Mr. Seddall, the solicitor in this matter of the Official Assignee, which was filed on the 5th day of July, 1924.

Some time in the year 1921 the appellants sold to the bankrupt three separate holdings for a bulk sum of £1,510. Of this £560 was paid in cash, and it was agreed that the balance should remain outstanding upon the security of the lands sold.

Of the three holdings, one was held under a fee-farm grant and the other two had been purchased under the Irish Land Purchase Acts, and had been duly registered as held in fee-simple subject to annuities payable to the Irish Land Commission.

For convenience sake it was arranged between the vendors and the purchaser, the bankrupt, that the £950 should be apportioned, as to £550 upon the lands held under the fee-farm grant, in respect of which no question arises here, and as to the remaining £400, that it should be secured by way of charge upon the registered lands, and it is admitted that a deed of charge, by which effect was given to this arrangement, was duly executed and recorded on or about the 25th day of February, 1922.

The total of the annuities payable to the Irish Land Commission was £14 5s. 4d., and by sub-s. 3 of sect. 54 of the Irish Land Act, 1903, the proprietor of a holding for the purchase of which an advance had been made under the Land Purchase Acts was prohibited from charging the lands for any sum exceeding ten times the amount of the purchase annuity payable in respect of the holding upon the making of the advance, and it was declared that every instrument of charge for any larger sum should be null and void as to the excess.

By sect. 78 of the Land Act, 1923, which appears to have come into effect upon the 9th day of August, 1923, sub-s. 3 of sect. 54 of the Irish Land Act, 1903, was repealed, and the main question for our decision is whether that repeal had the effect of making the claimant's charge a valid one for the

(1) Taml. 21.

full amount of £400, or whether, notwithstanding the repeal, the restriction upon the power to charge is still in operation, so far at least as transactions which took place before the repealing statute was passed, are concerned. Mr. Overend, for the appellants, relied upon the well-known passage in the judgment of Lord Tenterden in *Surtees* v. *Ellison* (1): "It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the Legislature." He also referred us to the statement of the law by Tindal C.J. in *Kay* v. *Goodwin* (2): "I take the effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

That these passages may be taken too literally, and, if so taken, are open to misconstruction, is apparent from the case of *Attorney-General* v. *Lamplough* (3), where a majority of the Judges of the Exchequer Division held, in supposed conformity with them, that the moment an Act of Parliament had been repealed they could not look upon the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted (4). Their decision was reversed in the Court of Appeal upon the ground that the effect of the repealing statute is the subject for consideration and that this cannot be ascertained without looking at the meaning of the statute which is repealed. Moreover, Lord Tenterden excepted from the "general rule" "transactions past and closed"; the charge with which we have to deal is one which was, by force of the statute, null and void as to the excess over ten times the amount of the purchase annuity.

In my opinion the repeal of a prohibition against doing a particular act falls very far short of setting up as valid an act which was null and void at the date when it was done, and which third parties were entitled to regard as non-existent.

The Interpretation Act of 1889, by sect. 38, sub-s. 2, enacts that: "Where . . . any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not (*a*) revive anything not in force or existing at the time at which the repeal takes effect; or (*b*) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or . . ."; and then follow three sub-clauses which appear to me less material.

In my opinion the effect of sect. 54, sub-s. 3, of the Land Act, 1903, upon the claimant's charge is preserved by each of these sub-clauses.

(1) 9 B & C. 750, at p. 752.
(2) 6 Bing 576, at pp. 582-3.
(3) L. R. 3 Ex. Div. 214
(4) L. R. 3 Ex. Div. 214, at p. 231.

Supreme Court.
1924.
In re STEWART.
FitzGibbon J.

The charge was "null and void as to the excess" at the date of the repeal, and as no contrary intention can be said to appear, it is not revived; the previous operation of the repealed statute had annihilated the charge so far as it purported to exceed the prescribed limit, and, failing an expression of a contrary intention, that previous operation was not affected by the repeal of the section which had theretofore prescribed the limit.

For these reasons I am of opinion that the repeal by sect. 78 of the Land Act, 1923, of sect. 54, sub-s. 3, of the Irish Land Act, 1903, has not made valid charges which were made null and void, because, or so far as, they exceeded the limit prescribed by the last-mentioned sub-section.

It must be borne in mind that this case is concerned only with lands purchased and charges created before the passing of the Land Act, 1923. I desire to express no opinion upon the validity or otherwise of a charge unlimited in amount created or imposed after the passing of the Act of 1923 upon lands purchased before that event.

One further point has been made by Mr. Overend. He contends that his clients are entitled to a lien upon the lands sold for the unpaid portion of their purchase-money, and that such a lien is not within the restriction as to amount imposed by sect. 54, sub-s. 3. It is unnecessary for me to consider whether such a lien could be described as a mortgage or charge within the sub-section, because I have come to a clear conclusion, for the reason already stated by the Chief Justice, that there is no such lien in the present case. Furthermore, the vendors took another security for the amount of the unpaid purchase-money, and the question whether by doing so this abandoned their lien is one of their intention to be inferred from their acts. The security they took was of a higher character by reason of the registration, though they were unaware of, or chose to ignore, the restriction as to amount. Mr. Overend was invited to discuss the case of *Capper* v. *Spottiswoode* (1), which I had turned up in the course of the argument, and which in its facts bears the closest analogy to the present, but he could only attempt to distinguish it by suggesting that Sir John Leach might have acted upon evidence not set out in the case. If so, of course there was no object in reporting it. So far as I have been able to ascertain by my own research, the case has never been questioned; it is referred to in the text books and in Halsbury's Laws of England (2) as an authority for the proposition stated in the headnote, and it seems to me to be common sense. In my opinion the vendors never intended to rely upon any lien, and the claim based upon it, put forward in this Court for the first time, must be disallowed. In my opinion the judgment appealed from is right, and should be affirmed with costs.

Solicitor for the appellants: *Theodore Cronhelm.*
Solicitor for the respondent: *William V. Seddall.*

C. L.

(1) Taml. 21.

(2) Vol. 19, p. 31, par. 47.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN ARBITRATION BETWEEN MARTIN LYNCH, APPLICANT; THE COUNTY COUNCIL OF LIMERICK, RESPONDENTS (1).

Supreme Court.
1925.
Jan. 13, 14.

Practice — Appeal — Workmen's Compensation Act, 1906 (6 *Ed.* 7, *c.* 58), *Schedule* II, *Art.* 4 — *Appeal from award of compensation by Judge of Circuit Court—Jurisdiction of Supreme Court to hear appeal—Jurisdiction vested in Court of Appeal transferred to Supreme Court—Appeal to High Court—Whether award is a "judgment or order of the Circuit Court in a civil case"—Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 18, 51, 61, *and* 63.

No appeal lies to the Supreme Court of the Irish Free State from an award made by a Judge of the Circuit Court under the Workmen's Compensation Act, 1906. The appeal lies to two Judges of the High Court under sect. 61 of the Courts of Justice Act, 1924, as such an award is a "judgment or order of the Circuit Court in a civil case" within the meaning of that section.

Per KENNEDY C.J.: The expression "civil cases" in sect. 61 of the Courts of Justice Act, 1924, is used in the wide and comprehensive sense of ordinary language, in contradistinction to criminal cases whereof one class only, namely, cases tried on indictment, is, by sect. 63, made the subject of appeal from the Circuit Court to the Court of Criminal Appeal.

Quaere whether there is not an appeal to two Judges of the High Court from a judgment or order of the Circuit Court in all civil cases, including matters in which the decisions of the former County Court, whose jurisdiction in respect thereof has been transferred to the Circuit Court, were final and conclusive, and subject to no appeal.

APPEAL under the Workmen's Compensation Act, 1906. The appeal was from an award made by the Circuit Court Judge of Limerick, Judge M'Elligott, K.C., dated October 29th, 1924, granting the applicant compensation under the Workmen's Compensation Act, 1906.

The appeal was taken to the Supreme Court of the Irish Free State. Part I of the Courts of Justice Act, 1924 (No. 10 of 1924), which provides for the establishment of the Supreme Court, came into operation on the 5th day of June, 1924 (2).

(1) In the Supreme Court, before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

(2) Courts of Justice Act, 1924 (No. 10 of 1924), sect. 2: "This Act shall come into operation on such day or days as may be fixed therefor by any Order or Orders of the Executive Council, and different days may be fixed for the commencement of the Act for different purposes, provided that no such day be later than five months after the passing of this Act." The Act was passed on the 12th April, 1924.

By the Courts of Justice Act, 1924 (Commencement) Order, 1924 (No. 5 of 1924), dated the 4th day of June, 1924, the Executive Council ordered (clause (3)): "The 5th day of June, 1924, is hereby fixed and appointed

Supreme Court. 1925.

LYNCH v. LIMERICK CO. COUNCIL.

Part II of the Act, which provides for the establishment of the Circuit Court, came into operation on the 11th day of June, 1924, in Dublin City and County, and came into operation on the 6th day of August, 1924, elsewhere in the Irish Free State. The award, the subject of the appeal, was, as stated, made by a Judge of the Circuit Court. Formerly, such awards were made by the Judges of the County Courts, but by sect. 51 of the Courts of Justice Act, 1924, there was transferred to the Circuit Court all jurisdiction (with certain exceptions not material for the purposes of this report) which, at the commencement of the Act, was vested in or capable of being exercised by Recorders and County Court Judges in the Irish Free State. The other material sections of the Courts of Justice Act, 1924, dealing with the transference of jurisdiction from the former Court of Appeal to the Supreme Court of the Irish Free State, and the jurisdiction conferred on the High Court to hear appeals from the Circuit Court, are set out in the course of the judgment of the Chief Justice.

Martin Lynch, the applicant, was engaged on June 28th, 1924, breaking stones for the Limerick County Council. He was paid at the rate of three shillings per yard for the stones broken. He supplied his own tools. Whilst engaged at this work he was struck with a sprawl in the left eye, and had, as the result of the injury, lost the sight of that eye. Formerly the applicant worked for the County Council at the quarries,

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as the day on which the Courts of Justice Act, 1924 (No. 10 of 1924), shall come into operation for the following purposes, that is to say:—

(*a*) the purposes of sects. 1, 2, and 3 of the Act, and

(*b*) the purposes of Part I of the Act, and

(*c*) the purposes of Part IV (except such provisions thereof as relate only to the Circuit Court or the District Court) of the Act."

Part I of the Act deals with "the High Court and the Supreme Court," and Part IV with "Miscellaneous and Transitory Provisions."

Accordingly, on the 5th day of June, 1924, the Courts of Justice Act, 1924, came into operation for the purposes of Part I of the Act, dealing with the Supreme Court and the High Court.

Part II of the Act deals with the Circuit Court, and two Orders were made bringing that Part of the Act into operation, the first dealing with Dublin City and County, and the second dealing with the rest of the Irish Free State. The Courts of Justice Act, 1924 (Commencement) (No. 2) Order, 1924 (No. 6 of 1924), dated the 11th day of June, 1924, fixed the 11th day of June, 1924, as the day on which the Act should come into operation in Dublin City and County for the purpose of Part II of the Act, and for the purpose of Part IV of the Act, so far as that Part relates to the Circuit Court. And the Courts of Justice Act, 1924 (Commencement) (No. 3) Order, 1924 (No. 9 of 1924), dated the 2nd day of August, 1924, fixed the 6th day of August, 1924, as the day on which the Act should come into operation for the following purposes wherever the Act was not already in force for those purposes by virtue of the Courts of Justice Act, 1924 (Commencement) (No. 2) Order, 1924, that is to say:—

(*a*) the purpose of Part II of the Act, and

(*b*) the purpose of Part IV of the Act so far as that Part relates to the Circuit Court.

and was remunerated at the rate of thirty-six shillings a week. He had been only four days on piece work when the accident occurred. He was free any day to go to work, or to stay at home. On behalf of the County Council, evidence was given showing that the applicant was not controlled or directed by its officials. The stones had to be broken to a particular size, and a report to that effect had to be sent by the surfaceman to the foreman of the County Council.

The case made by the County Council was that the applicant was not a workman within the meaning of sect. 13 of the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58).

The Circuit Judge held that the applicant was a workman, and ordered the County Council to pay him compensation at the rate of 18s. a week from June 28th, 1924, till October 1st, 1924, and at the rate of 16s. from October 1st, so long as total or partial incapacity continued. He further ordered that the Council pay forthwith a sum of £12 in respect of the weekly payments for the first period.

Bartley (with him *J. M. FitzGerald K.C.*), for the appellants:—

As no supervision was exercised over the applicant by the County Council, he was not a workman, and must be regarded as an independent contractor: *Ryan* v. *Tipperary Co. Council* (*S.R.*) (1).

[KENNEDY C.J.: Does an appeal lie to this Court?]

There are rules regulating appeals under the Workmen's Compensation Act, and these rules have not been repealed.

[KENNEDY C.J.: Since these rules were framed new Courts have been established under the Courts of Justice Act, 1924, and sect. 61 of that Act provides that "Save as in this Act is otherwise expressly provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two Judges of the High Court sitting in Dublin." The question is: Does that exclude appeals under the Workmen's Compensation Act? I would also refer you to sect. 18 of the Act.]

Section 1 and Schedule 2 of the Workmen's Compensation Act, 1906, treat the hearing of an application for compensation as an arbitration.

M. Comyn K.C. (with him *J. Comyn*), for the applicant, the respondent:—

An award made by a Circuit Judge under the Workmen's Compensation Act, 1906, is a "judgment or order" within the meaning of sect. 61 of the Courts of Justice Act; and an appeal from such judgment or order lies, not to the Supreme Court, but to two Judges of the High Court.

(1) 46 Ir. L. T. R. 69.

Supreme Court. 1925.

LYNCH v. LIMERICK CO. COUNCIL.

[KENNEDY C.J.: In the enumeration of civil cases given in sect. 48 of the Courts of Justice Act, cases under the Workmen's Compensation Act are not included.]

Section 48 is an extending section. In the classes of cases mentioned, it simply increases the limited jurisdiction of the former County Court. Section 61 is quite consistent with sect. 48.

Should this Court decide to entertain the appeal, we submit that the applicant is a workman within the meaning of the Act, and that the case is indistinguishable from that of *Ryan* v. *Tipperary County Council* (*N.R.*) (1).

Bartley, in reply:—

A right of appeal under the Workmen's Compensation Act was given to the Court of Appeal of the Supreme Court of Judicature in Ireland; and, by Article 73 of the Constitution, the laws in force in the Irish Free State at the date of the coming into operation of the Constitution "shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." By sect. 18 of the Courts of Justice Act there has been transferred to the Supreme Court the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by the former Court of Appeal. The jurisdiction exercised by the County Court under the Workmen's Compensation Act was transferred to the Circuit Court; and appeals from awards made by Circuit Judges lie to the Supreme Court. An award under the Workmen's Compensation Act is not an "order or judgment" within the meaning of sect. 61 of the Courts of Justice Act, 1924. Rule 28 of the Consolidated Workmen's Compensation (Ireland) Rules, 1917, made under the Workmen's Compensation Act, on 9th May, 1917, provides that the award of the Judge on any arbitration shall be enforceable "in the same manner as a decree or order of the Court." That shows that an award under the Act is not an order or judgment.

If the term "civil cases" were interpreted in the wide sense suggested, appeals from the Circuit Court to two Judges of the High Court would lie in cases where the decisions of the former County Court were final and conclusive.

KENNEDY C.J.:—

This is an appeal from a decision of Circuit Court Judge M'Elligott, acting as arbitrator under the provisions of the Workmen's Compensation Act, 1906.

The first question which arises is whether the appeal was properly brought in this Court. Counsel appeared at first not

(1) 49 Ir. L. T. R. 1.

to be over-anxious to argue the question; but, as it goes to the root of our jurisdiction, we were obliged to require that it should be argued.

The jurisdiction of the Circuit Court Judge to act in lieu of the former County Court Judge in cases under the Workmen's Compensation Act, arises under sect. 51 of the Courts of Justice Act, 1924 (No. 10 of 1924). By that section there is transferred to the Circuit Court "all jurisdiction not hereinbefore expressly excepted, which, at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges . . . or any of the same in Saorstát Éireann," with certain specified exceptions, of which this is not one. Section 48 confers a jurisdiction on the Circuit Court more extended in regard to certain civil matters than that which was formerly exercised by the County Court; but sect. 51 vests in the Circuit Court all jurisdiction, with the exceptions mentioned, which was exercised by Recorders and County Court Judges at the time of the commencement of the Act.

The appellate jurisdiction of the Supreme Court takes its root in the Constitution. Article 66 of the Constitution says:—"The Supreme Court of the Irish Free State (Saorstát Éireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law), and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court." By sect. 18 of the Courts of Justice Act, it is provided that "the Supreme Court shall be a Superior Court of Record with such appellate jurisdiction as is prescribed by the Constitution, and, subject as in this Act is provided, there shall be transferred to the Supreme Court the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by the existing Court of Appeal of the Supreme Court of Judicature in Ireland or any Judges or Judge thereof."

The Court of Appeal of the former Supreme Court of Judicature had no jurisdiction to entertain appeals from the Circuit Court, because the Circuit Court was not at the time in existence. Consequently, sect. 18, which is a section transferring then existing jurisdiction, cannot have the effect contended for, namely, to lay an appeal from the Circuit Court to this Court.

The Circuit Court being a newly created Court, it was necessary to make express provision for appeals from the decisions of that Court. Such provision is made as regards "civil cases" by sect. 61 of the Courts of Justice Act, which prescribes as follows:—"Save as in this Act is otherwise expressly provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two Judges of the High Court sitting in Dublin . . ." It is only in the case of disagreement between the two Judges of the High Court that a further appeal lies to this Court.

Supreme Court. 1925. LYNCH v. LIMERICK CO. COUNCIL. Kennedy C.J.

Two points of construction have been discussed upon the words in sect. 61: "An appeal shall lie from any judgment or order of the Circuit Court in civil cases." It has been questioned, in the first place, whether this is an appeal from a "*judgment or order,*" and, secondly, whether the present is a "*civil case*" within the meaning of the section. By virtue of sect. 51, the Circuit Court has power, as I have already mentioned, to exercise the jurisdiction of the County Court Judge to act as an arbitrator under the Workmen's Compensation Act. Is such an arbitration conducted by the Circuit Judge a "*civil case*" within sect. 61? It has been sought to give a narrow and specialised interpretation to the expression "civil cases." Having regard, however, to the context, and particularly to sect. 63, it seems clear that the expression "civil cases" is used in the wide and comprehensive sense of ordinary language, in contradistinction to criminal cases, whereof one class only, namely, those tried on indictment, is, by sect. 63, made the subject of appeal from the Circuit Court to the Court of Criminal Appeal.

Is an award made under the Workmen's Compensation Act a "*judgment or order*" within the meaning of sect. 61 of the Courts of Justice Act? Article 4 of the Second Schedule to the Workmen's Compensation Act, 1906, gave the former right of appeal in terms which should be referred to in considering this question. Having stated that a committee or an arbitrator may submit any question of law for the decision of the Judge of the County Court, that Article goes on to provide that "the decision of the Judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he *gives any decision or makes any order under this Act,* shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal." It is clear from that Article that the award made by the County Court Judge was regarded as in the nature of an order, or as containing in its curial parts what could be described as an order. Certainly it is a decision, and when in favour of the workman it is in the nature of a judgment and order for the payment of money. The words with which we are concerned in sect. 61 of the Courts of Justice Act are "judgment or order"; and when we turn to the actual award in this case we find it is made in the form of an order, not merely awarding that the employers were liable to pay compensation, but ordering payment of that compensation: it went further, and ordered the payment of £12, arrears of compensation. Unless the Circuit Judge went outside his powers—and no such suggestion has been made—in making that order, we have clearly an "order" in this case within the terms of the first sentence of sect. 61 of the Courts of Justice Act.

I am of opinion that this is an appeal from "a judgment or

order of the Circuit Court in a civil case" within sect. 61 of the Courts of Justice Act, 1924, and, therefore, that it is governed by sect. 61, and can only be taken in the manner and to the Court there prescribed, and, accordingly, that we cannot entertain the appeal to this Court. As we are making no rule on the application, for want of jurisdiction, I will refrain from saying anything in regard to the merits.

O'CONNOR J.:—

I concur, and for the reasons stated by the Chief Justice.

FITZGIBBON J.:—

The Circuit Court and this Court are the creations of statute, and each possesses only that jurisdiction which was conferred upon it by the Legislature to which it owes its existence. It is true that sect. 18 of the Courts of Justice Act transferred to this Court the jurisdiction which was, at the commencement of the Act, vested in, or capable of being exercised by, the then existing Court of Appeal; but, as the Circuit Court had not then come into existence, and did not in fact exist until long after this Court had begun to exercise its functions under the Act, it is clear that no appellate jurisdiction over the Circuit Court was *transferred* under sect. 18.

No right of direct appeal from the Circuit Court to this Court is created by the Act so far as I am aware, and certainly none such is expressly provided in the case of an award under the Workmen's Compensation Act, but, if no alternative existed, I should strive to hold that an appeal lay to this Court, as I do not believe that the Legislature can have intended by a side wind to deprive parties of an existing right of appeal, which was not long ago extended from the former Court of Appeal even to the House of Lords.

In my opinion such a right of appeal has been conferred by sect. 61, and two Judges of the High Court have been substituted for the late Court of Appeal as the appellate tribunal in cases under the Workmen's Compensation Act. "Save as in this Act is otherwise expressly provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two Judges of the High Court sitting in Dublin." The award of the Circuit Judge is in form and substance an "order." The rules refer in many places to a "decision or order" under the Act, and the prescribed form of award commences: "I award as follows . . . 1. I order . . ." and so forth.

Then, holding as I do, that this award is an order, is it an order in a "civil case"? "Case" appears to me to have been used as equivalent to "cause or matter," and in my opinion an application to a Circuit Judge under the Workmen's

Supreme Court. 1925.

LYNCH v. LIMERICK CO. COUNCIL.

FitzGibbon J.

Compensation Act is a "civil cause or matter," and an order therein or thereon is an "order in a civil case" within sect. 61.

Mr. Bartley has urged that there are many matters falling within the category of "civil cases" in which the decisions of Recorders and County Court Judges, whose jurisdiction in respect thereof has been transferred to the Circuit Court by sect. 51, were final and conclusive and subject to no appeal, and that the Legislature cannot have intended to create a new right of appeal in all these cases. I do not see why it should not have so intended, especially as the jurisdiction of the Circuit Court is enormously greater than that of the old County Courts, and it cannot fairly be described as "the poor man's Court." But, in any case, the decision of a Recorder or County Court Judge under the Workmen's Compensation Act was never final and conclusive and was always subject to appeal on matters of law, and it will be time enough to consider the other cases when one of them is directly brought before us. It may be, as my brother O'Connor suggested in the course of the argument, that the special statutory prohibition against appeal will be found effective even against the wide language of sect. 61. That, however, will be another day's work.

I agree that this appeal should be struck out on the ground that this Court has no jurisdiction to entertain it.

Solicitor for the appellant: *P. J. O'Sullivan.*
Solicitor for the respondents: *R. Fox.*

C. L.

HODGENS *v.* FUREY.
(1924. No. 8309.)

Johnston J.
1924.
Nov. 18, 19.

Landlord and tenant—Action to recover possession—Action brought in High Court — Jurisdiction of County Court under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923—"Claim or other proceeding arising out of" the Act—Right to costs—Increase of Rent and Mortgage Interest (Restrictions) Act, 1923 (No. 19 of 1923), sect. 18, sub-sect. 1.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, sect. 18, sub-sect. 1, provides:—"A County Court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, and notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a County Court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the County Court, he shall not be entitled to recover any costs unless the Court on any special ground shall otherwise order."

Plaintiff brought an action in the High Court to recover possession of a flat held from him by the defendant as a statutory tenant under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, the rent having fallen into arrear. Judgment for possession was given, but defendant contended that under sect. 18, sub-sect. 1, plaintiff was not entitled to recover any costs.

Held, that the action was not a "claim or other proceeding arising out of" the Act, or any of the provisions thereof, within the meaning of the section, and accordingly the plaintiff was entitled to costs.

ACTION for the recovery of possession of a flat.

The Statement of Claim set out that—1, by an agreement in writing, dated the 19th day of May, 1920, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff agreed to let and the defendant agreed to take from the plaintiff all that the hall flat and basement of the house and premises No. 19 Hume Street in the City of Dublin for use as a private dwelling flat only, for the term of one year from the 24th day of May, 1920, at the rent of seventy pounds, to be paid quarterly in advance. 2, The defendant entered into possession of the said premises as tenant thereof to the plaintiff under the said agreement, and on the expiration of the said term continued in possession thereof under the terms of the said agreement. The rent reserved by the said agreement having fallen into arrear, the plaintiff, on the 21st day of June, 1923, instituted an action against the defendant in the King's Bench Division of the High Court of Justice (Saorstát Éireann) for recovery of possession of the said premises for non-payment of the rent thereof. 3, By an order made on consent of the said parties to the said action, dated the 14th day of December, 1923, it was ordered that all further proceedings in the said action should be stayed on the terms therein mentioned, and, amongst others, on the terms that a new statutory tenancy in the said premises under the Increase

Johnston J. 1924.

HODGENS v. FUREY.

of Rent and Mortgage Interest (Restrictions) Act, 1923, should be deemed to have been entered into between the plaintiff and the defendant, to commence from the 24th day of November, 1923, and to continue under the terms of the said Act, and that the rent thereof should be at the rate of £42 per annum payable monthly at the rate of £3 10s. per month, the first payment to be made on the 24th day of December, 1923, and each monthly payment of rent on the same date in each month afterwards. Paragraph 4 of the Statement of Claim was as follows:—"4. The defendant has since the date of the said order retained possession of the said premises by virtue of the provisions of the said order, but has not duly, punctually, or regularly paid the rent fixed by the said order, and there is now three months' rent to the 24th day of May, 1924, due and owing to the plaintiff. In consequence of the defendant's failure to pay his said rent the defendant now is entitled to recover possession of the said premises by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923." And the plaintiff claimed possession of the said premises.

The defendant, in his defence, admitted the matters pleaded as to the making of the order on consent in the prior action, but said that he had observed the terms of the said order as to the payment of the rent monthly. He admitted that there was three months' rent due by him to the plaintiff up to the 24th May, 1924, amounting to the sum of £10 10s., and defendant brought the said sum into Court, and said that sum was sufficient to satisfy the plaintiff's claim. Defendant also relied on the protection given to tenants by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, and also relied on sect. 18, sub-sect. 1, of the said Act relating to costs (1).

The action was tried without a jury, and at the conclusion of the hearing, judgment having been given for the plaintiff for possession, the question of the right to costs was argued.

Costello, for the plaintiff:—The plaintiff is entitled to judgment with costs. Costs should follow the event.

Dickie K.C. and *Henry,* for the defendant:—The plaintiff is not entitled to any costs. Sect. 18, sub-sect. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, deprives the plaintiff of costs, as the action could have been brought in the County Court as it is "a claim or other proceeding arising out of" the Act "or the provisions thereof." Under that section "if a person takes proceedings under this Act in the High Court which he could have taken in the County Court, he shall not be entitled to recover any costs unless the Court on any special ground shall otherwise order." There is no such special ground here.

(1) Sect. 18, sub-sect. 1, is set out at the beginning of the head-note of this report.

Costello, in reply:—This action is not "a claim or other proceeding arising out of" the Act. It is an ordinary action of ejectment and it arises at common law. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, has been relied on by way of defence only. *Johnston J.* 1924. HODGENS v. FUREY.

Cur. adv. vult.

JOHNSTON J.:— Nov. 19.

The only question that now remains is that of costs. The defendant, relying on sect. 18, sub-sect. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, contends that this action could have been brought in the County Court—though he does not particularise in what form it could have been brought there—and that, as a consequence, the successful plaintiff must be deprived of his costs. The plaintiff, on the other hand, says that this action is not a "claim or other proceeding" arising "out of" the Act, but is an ordinary action of ejectment based on the law regulating the rights of landlords and tenants.

The policy of the Act was to deprive landlords of some of their common and statute-law rights and to confer on certain tenants statutory rights that they did not previously possess. These rights are limited in their number and scope, and are dependent upon the observance by the tenant of the conditions that apply. Thus, a statutory tenant is protected from eviction so long as he pays his rent and observes the other conditions of his tenancy. If he fails in either of these matters, the protective force of the statute disappears, leaving the tenant at the mercy of the ordinary law. It is, therefore, not strictly correct for the plaintiff to say, as he does in his Statement of Claim, that possession is sought "by virtue of the provisions" of the Act of 1923. What he really means is that possession is sought "notwithstanding the provisions" of that Act.

The tenancy in the defendant was originally created by an agreement in writing, dated May 19th, 1920. The rent fell into arrear, and an action was instituted in 1923 to recover possession of the premises. That action was tried by Mr. Justice Dodd on December 14th, 1923, when an order on consent was made, providing that all further proceedings should be stayed on the terms that a new statutory tenancy in the premises under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, should be deemed to have been created between the plaintiff and the defendant as from November 24th, 1923, and that the rent should be £42 per annum payable monthly at the rate of £3 10s. per month, the first payment to be made on December 24th, 1923. On entering into this arrangement, the disabilities of the landlord and the conditional rights of the tenant came into operation.

Johnston J. 1924.

HODGENS v. FUREY.

I have decided that by reason of the non-payment of his rent and in view of the other matters proved in the case, the tenant is no longer protected by the Act, and that it is reasonable that an order for possession should be made against him.

Under the circumstances, can I regard this action of ejectment as a "claim or other proceeding" arising "out of" the Act? An examination of the statute discloses a large number of matters that may be the subject of controversy between landlords and tenants under this legislation, including the questions that may arise under sections 1 (*h*), 2 (1) and (4), 3 (3), 5, 8 (1), (2), and (6), 9, and 14; and in all these cases it is probable that the Court that is intended primarily to have jurisdiction is the County Court, except in the cases coming within section 18 (2), which confers a limited jurisdiction upon the District Court. That sub-section in itself, in reserving from the jurisdiction of the District Court certain classes of "claims or other proceedings," affords some indication of the meaning and scope of that phrase. The words "the Court" have a different denotation in different parts of the Act. Thus, in the sections that I have just referred to, they probably mean the County, or, where the conditions apply, the District, Court. In section 17 (3) these words probably mean the Court by which the order or judgment was pronounced. In section 13 (2) they refer to a Court of summary jurisdiction. So it is no strain upon the general construction of the Act to hold that the words "the Court" in section 4 refer to the particular Court in which the ejectment proceedings have been brought. I am of opinion that the object of section 18 was merely to limit the costs of the proceedings that may be taken under the Act to settle the numerous and novel questions that may arise from time to time by reason of the legislation, and that the section does not at all apply to proceedings instituted for the purpose of bringing to an end the relationship of landlord and tenant. There is nothing in the Act which suggests that the costs of actions in the High Court were intended to be affected by this legislation. It is noteworthy that the statutory Rules of Court under the Act made on July 27, 1923 (Hughes' "Increase of Rent and Mortgage Interest (Restrictions) Act," p. 111), strongly support this view of the section; I would refer particularly to Rules 8 to 23. I think that I am entitled to appeal to the code of procedure for guidance in this matter, seeing that the rule-making authority, unlike other such authorities, was expressly given power to "make such rules and give such directions as it thinks fit for the purpose of giving effect to this Act" (sect. 19). There must, therefore, be judgment for possession with costs.

Solicitor for plaintiff: *H. B. O'Hanlon.*
Solicitor for defendant: *S. Rutherford.*

H. H.

THE STATE *v.* EDWARD KELLY AND EDWARD GORMAN (1).

Court of Crim. App. 1924.

July 25, 26, 28, 31.

Criminal appeal—Identification of accused—Evidence—Question by jury—Improper answers — Mixture of hearsay and opinion — Setting aside conviction.

One, Atkinson, was murdered by two men on the 8th March, 1923, and on the following day his widow gave a description of the two men to the Civic Guard. The two appellants were arrested by the military some months later (though not in connection with the murder), and interned in an Internment Camp till February, 1924. In February, 1924, the two appellants were, with other men, paraded before Mrs. Atkinson (the widow of the murdered man) at the Internment Camp, when she pointed out the two appellants. They were handed over to civil custody and charged with the murder on February 21st, 1924. They were put on trial for the murder, were convicted, and sentenced to death. At the trial, after the evidence on both sides had closed, the Foreman of the jury said he had been requested by the jury to ask the Judge three questions, of which the third, and the answer, were as follows:—

Foreman: "Was it on Mrs. Atkinson's description that accused were identified by the authorities, and, if so, how soon after the arrest?"

Superintendent Murphy (of the Civic Guard): "A month after the arrest."

The Judge: "Was it from the description of Mrs. Atkinson?"

Superintendent Murphy: "Oh, yes, my Lord."

Foreman: "That is all we want to know."

The Court of Criminal Appeal, being of opinion that the question was put by the jury to test the description of the persons who committed the crime given by Mrs. Atkinson the morning after the murder (though that description was not, in fact, in evidence, and could not have been given in evidence against the prisoners); that the meaning of the question and the substance of the evidence given in answer were that some person or persons referred to indefinitely as "the authorities" shortly after the prisoners had fallen into the hands of the military compared the prisoners with the description given by Mrs. Atkinson, and formed the opinion that the prisoners were the persons described by Mrs. Atkinson; and that the jury in this way satisfied themselves that the identification of the prisoners by Mrs. Atkinson at the identification parade and at the trial agreed with her original description of the men, and that it was more than likely that the jury thought they should be so satisfied before finding a verdict:

Held, that the conviction should be reversed on the ground that the substance of the evidence obtained by the jury by means of the question was not legal or proper evidence against the appellants, being a mixture of hearsay and opinion of unnamed persons, and that it could not by any device in forming questions have been got legally into evidence on the part of the prosecution against the appellants, and that it was crucial in arriving at the verdict, which depended entirely on identification.

CRIMINAL APPEAL.

The appellants, Edward Kelly and Edward Gorman, were tried for the wilful murder of Samuel Atkinson, and were convicted, and sentenced to death at the Central Criminal Court, Dublin, on July 16th, 1924. At the conclusion of the trial, the

(1) Before KENNEDY C.J.; SULLIVAN, President of the High Court; FITZGIBBON and JOHNSON JJ.

Court of Crim. App. 1924.

THE STATE v. KELLY AND GORMAN.

trial Judge, O'Shaughnessy J., refused to grant certificates under sect. 31 (i) of the Courts of Justice Act, 1924 (No. 10 of 1924), that the cases were fit cases for appeal, and from that refusal the appellants appealed to the Court of Criminal Appeal.

On the night of March 8th, 1923, Samuel Atkinson was shot dead in his house at Lisnalong, County Monaghan. The murdered man was postmaster at Lisnalong. On the night in question, deceased, his wife, his youngest child, and Owen M'Cabe, and Patrick Connolly were sitting in the kitchen when two men, identified by Mrs. Atkinson as the two appellants, came to the door.

Describing what occurred, Mrs. Atkinson deposed that the appellant, Kelly, producing a revolver, ordered M'Cabe and Connolly to put up their hands. They obeyed. He next ordered her to put up her hands, but she refused. Kelly ordered her husband to produce the keys and open the office. Her husband refused, and walked forward towards Kelly, who backed out of the kitchen. During this time Gorman (the other appellant) was at the kitchen door. Both then backed out together to the porch followed by her husband and herself. She had the kitchen lamp in her hand. When the prisoners were at the front door leading into the street Gorman said to Kelly, "Pink him, pink him." Kelly then fired, but nobody was hit. Her husband then closed the outer door, and at once two shots were fired through the door. The bullets passing through the door entered her husband's body, and he died the next day. Mrs. Atkinson described the men to the police the day following the murder.

The two appellants were arrested some months later by the military—but not in connection with the murder—Kelly in May, 1923, and Gorman in August, 1923. They were interned at the Curragh Military Internment Camp until February, 1924. On February 5th, 1924, Mrs. Atkinson identified the appellants as the two men who raided her house on the night her husband was murdered.

Thomas Connolly and Owen M'Cabe, examined for the defence, deposed that they could not identify the men who entered the house of the deceased on the night of the murder.

At the conclusion of the evidence the Foreman of the jury intimated that he had been requested to ask the Judge three questions. The first question was whether the deceased had made any depositions, and this question having been answered in the negative, the Foreman said:—

"The second question is:—How long were the prisoners known to be living in the locality after the murder?"

MR. JUSTICE O'SHAUGHNESSY: "I cannot answer that." (To *Mr. Carrigan K.C.*): "Can you?"

Superintendent Murphy (Civic Guard): "Kelly was arrested in August, 1923, and this was March in which this murder was committed — five months."

Mr. Carrigan K.C.: "Had he been living in the locality all that time?"

Superintendent Murphy: "He was being sought for. It is unknown really where he was, but he was being looked for."

MR. JUSTICE O'SHAUGHNESSY: "I see. And ultimately interned, I suppose?"

Superintendent Murphy: "Interned. In fact, he was fired at and shot while being ——"

Mr. Lavery: "Of course, this is not evidence."

MR. JUSTICE O'SHAUGHNESSY: "The jury has asked for it."

Mr. Carrigan K.C.: "The jury has asked the question."

Mr. Lavery: "I know, but the Superintendent has no knowledge of it."

Superintendent Murphy: "I have."

Mr. Lavery: "Yes, but no legal knowledge—no legal evidence."

MR. JUSTICE O'SHAUGHNESSY: "Has he been in custody since August last?"

Superintendent Murphy: "Yes."

MR. JUSTICE O'SHAUGHNESSY: "And you say he was sought for before August?"

A Juror: "Was he about the neighbourhood for any length of time after the murder was committed?"

Superintendent Murphy: "He may, or may not have been, but he was being sought for the whole time."

A Juror: "For what purpose?"

Superintendent Murphy: "For this murder, sir, and I will not say any more."

A Juror: "That is all we want to know."

Foreman (putting third question): "Was it on Mrs. Atkinson's description that accused were identified by the authorities, and, if so, how soon after the arrest?"

Superintendent Murphy: "A month after the arrest."

MR. JUSTICE O'SHAUGHNESSY: "Was it from the description of Mrs. Atkinson?"

Superintendent Murphy: "Oh, yes, my Lord."

Foreman: "That is all we want to know."

The jury found both prisoners guilty, and they were sentenced to death.

O'Shaughnessy J. having refused to grant the appellants certificates that their cases were fit cases for appeal, they appealed to the Court of Criminal Appeal. The following were the grounds of the appeal:—1, That there was no evidence sufficient to sustain the verdict; 2, that evidence was illegally and improperly admitted; 3, that the trial was unsatisfactory; and 4, that there had been a miscarriage of justice. Notice was also served on behalf of the appellants for an order for leave to call evidence and produce witnesses for the purpose of disproving the truth and accuracy of the statement made at the trial by Superintendent Murphy in answer to the question of the jury that the accused were looked for for this murder immediately after the crime.

Lynch K.C. and *Lavery* for the appellants:—

We submit that there was not sufficient evidence of identification. Where the identification of accused persons depends solely upon the evidence of one witness it is the bounden duty of the Judge in his charge to the jury to tell them that they

Court of Crim. App. 1924.

THE STATE v. KELLY AND GORMAN.

should carefully scrutinise that evidence before they act upon it: *R.* v. *Millichamp* (1). Misdirection as to the evidence of identification may be a ground for quashing a conviction: *R.* v. *Bundy* (2). A Judge in summing up is bound to put the case of the accused to the jury: *R.* v. *Marriott* (3). In his charge in this case the Judge did not put the case for the defence to the jury.

The answers to the second question put by the jury introduced irrelevant matter calculated to prejudice the jury. The suggestion conveyed was that the appellant Kelly was a lawless man. Until this evidence was given, the trial had proceeded on the basis that no suspicion rested on the appellants between the date of the murder and February, 1924. We can give evidence showing that the appellants were not sought for; and we ask the Court to receive an affidavit by their solicitor in support of the application for leave to call evidence for the purpose of disproving the truth of Superintendent Murphy's statement that the accused were looked for for the murder immediately after the crime.

[*Carrigan K.C.*—I object. Leave to call fresh evidence should not be given unless the Court is satisfied that there has been a miscarriage, and that evidence which ought to have been admitted at the trial was not admitted. These circumstances do not arise here. Counsel for the accused might have produced at the trial the evidence which he now seeks to call.

KENNEDY C.J.: We will hear both sides before ruling.]

In regard to the third question and the answers thereto, we would point out that only in cases of rape, indecent assault, and similar offences upon females is the fact that the prosecutrix made a complaint shortly after the outrage of the matters charged against the prisoner admissible as evidence for the prosecution. Superintendent Murphy did not speak of his own knowledge, and he gave only hearsay evidence. Were the inquiries made by himself or by somebody else? He could only give evidence of inquiries if they had been made by himself. Evidence not legally admissible having been admitted, we submit that the conviction is bad, and that it ought to be reversed: *The Queen* v. *Gibson* (4); *The Queen* v. *Saunders* (5); *R.* v. *Margulas* (6).

Carrigan K.C. and *Bewley*, for the State:—

The fact that a statement was made to the police and that in consequence of it the accused was arrested is undoubtedly admissible: *R.* v. *Wink* (7); *R.* v. *Wilkins* (8); *R.* v. *Wainwright* (9). The jury were entitled to put the questions which they had addressed to the Judge and to Superintendent Murphy.

(1) 16 Cr. App. R. 83.
(2) 5 Cr. App. R. 270.
(3) 18 Cr. App. R. 74.
(4) 18 Q. B. D. 537.
(5) [1899] 1 Q. B. 490.
(6) 17 Cr. App. R. 3.
(7) 6 C. & P. 397.
(8) 4 Cox, Cr. C. 92.
(9) 13 Cox, Cr. C. 171.

[FITZGIBBON J.: I think you have to show that these questions could have been put by you.]

The jury is entitled to put questions that neither side could put. What the questions put in this case really mean is that in consequence of a statement or description given by Mrs. Atkinson the police authorities arrested the accused. Even if the evidence elicited by the jury was illegal evidence that would not be enough to set aside the verdict: *R.* v. *Beecham* (1); *R* v. *Brownhill* (2). In any event the evidence given in reply to the jury could have been obtained by formal questions put in accordance with the recognised practice.

A slight mistake in summing up is not a ground for quashing a conviction: *R.* v. *Parker* (3); nor will a conviction be quashed where the Court is of opinion that the jury would have come to the same conclusion even if the summing up had been adequate: *R.* v. *Totty* (4). Mere omission to deal with a point of evidence is not necessarily misdirection: *R.* v. *Maclean* (5).

Lynch K.C. in reply.

Cur. adv. vult.

July 31.

The judgment of the Court was delivered by KENNEDY C.J.:—

The appellants, Edward Kelly and Edward Gorman, were tried at the Central Criminal Court on the 16th July, 1924, for the murder of Samuel Atkinson at Lisnalong, in the County of Monaghan, on the 8th March, 1923. They were found guilty, and sentenced to death. The appeal is taken from a refusal by the Judge at the trial, O'Shaughnessy J., to grant a certificate under section 31 of the Courts of Justice Act, 1924 (No. 10 of 1924) that the case was a fit case for appeal, but it was agreed the whole case should be heard as if such certificate had been granted.

The grounds of the appeal are—1, that there was no evidence sufficient to sustain the verdict; 2, that evidence was illegally and improperly admitted; 3, that the trial was unsatisfactory; and 4, that there was a miscarriage of justice. Application was also made for leave to call evidence for the purpose of disproving the truth and accuracy of the statement made by Superintendent Murphy, a witness at the trial, in answer to a question of the jury, that the accused were looked for for this murder immediately after the crime. The Judge's charge to the jury, though no objection was taken to it at the time, and though it was not made the subject of a specific ground of appeal in the notice of appeal, was impeached here during the argument.

The only real question at the trial was one of identification, viz.: Were the two accused men the same two men who

(1) [1921] 3 K. B. 464.
(2) 8 Cr. App. R. 118, also at p. 258.
(3) 2 Cr. App. R. 118.
(4) 111 L. T. 167.
(5) 17 Cr. App. R. 79.

Court of Crim. App. 1924.

THE STATE v. KELLY AND GORMAN.

Kennedy C.J.

murdered Samuel Atkinson on the evening of the 8th March, 1923? Three persons who were present when the crime was committed gave evidence at the trial. Mrs. Atkinson, the widow of the murdered man, gave evidence positively identifying the two prisoners as the perpetrators of the crime. Two young men who were present on the occasion were called by the defence, and they said they did not identify the prisoners as the murderers. One went further and said they were not the men. The question of identification was, therefore, before the jury with the evidence upon which it might be determined one way or the other, and the Court is of opinion that the first ground of appeal is not sustainable.

The Court has examined the verbatim report of the Judge's charge to the jury and is of opinion that it satisfied every requirement—that it put the whole case (both the case of the prosecution and the case of the defence) fully and adequately before the jury—and that no exception whatever can be taken to it. In so far as this appeal has been based on the Judge's charge, it wholly fails.

The main argument of counsel for the prisoners has been addressed to certain questions put by the jury to Superintendent Murphy, who was in charge of the Civic Guard in the district where the crime was committed, and his answers to these questions.

It is necessary in this connection to refer to the principal relevant dates. Samuel Atkinson was murdered on the evening of the 8th March, 1923. Mrs. Atkinson, the widow, made a report to the Civic Guard the next morning, when she gave them a description of the men who had committed the crime. The two prisoners were arrested some months later, Kelly in August, 1923, and Gorman, apparently, in May, 1923. They were not arrested by the Civic Guard or for this crime. They were taken into military custody for some other reason, not relevant to the issue on the trial, and interned in the Military Internment Camp at the Curragh, where they were held—presumably, under the powers given by the Oireachtas in relation to the recent disturbances—until February of the present year, 1924. On the 5th February the prisoners were, with other men, paraded before Mrs. Atkinson at the Internment Camp, when she identified the accused. They were handed over to civil custody and charged with this murder on the 21st February.

It should be stated here that the homes of the two prisoners are about four or five miles from the scene of the murder and about a mile apart from one another.

After the evidence of both sides had closed, and before the final speeches of counsel and the Judge's charge, the Foreman of the jury said he had been requested by the jury to ask the Judge three questions. The first was whether the deceased had made any depositions, to which the answer was that he had not. Nothing turns upon this.

The second question was, "How long were the prisoners known to be living in the locality after the murder?" This question was answered as follows:—

"MR. JUSTICE O'SHAUGHNESSY: 'I cannot answer that.' (To *Mr. Carrigan K.C.*): 'Can you?'

"*Superintendent Murphy*: 'Kelly was arrested in August, 1923, and this was March in which this murder was committed—five months.'

"*Mr. Carrigan K.C.*: 'Had he been living in the locality all that time?'

"*Superintendent Murphy*: 'He was being sought for. It is unknown really where he was, but he was being looked for.'

"MR. JUSTICE O'SHAUGHNESSY: 'I see. And ultimately interned, I suppose?'

"*Superintendent Murphy*: 'Interned. In fact, he was fired at and shot while being ——'

"*Mr. Lavery*: 'Of course, this is not evidence.'

"MR. JUSTICE O'SHAUGHNESSY: 'The jury has asked for it.'

"*Mr. Carrigan K.C.*: 'The jury has asked the question.'

"*Mr. Lavery*: 'I know, but the Superintendent has no knowledge of it.'

"*Superintendent Murphy*: 'I have.'

"*Mr. Lavery*: 'Yes, but no legal knowledge—no legal evidence.'

"MR. JUSTICE O'SHAUGHNESSY: 'Has he been in custody since August last?'

"*Superintendent Murphy*: 'Yes.'

"MR. JUSTICE O'SHAUGHNESSY: 'And you say he was sought for before August?'

"*A Juror*: 'Was he about the neighbourhood for any length of time after the murder was committed?'

"*Superintendent Murphy*: 'He may, or may not have been, but was being sought for the whole time.'

"*A Juror*: 'For what purpose?'

"*Superintendent Murphy*: 'For this murder, sir, and I will not say any more.'

"*A Juror*: 'That is all we want to know.'"

Upon this Mr. Lavery (who had been counsel for the prisoners at the trial) argued that the statements of Murphy gave a new turn to the trial, and the defence (then closed) was shattered. He told us that he had proceeded up to that point on the basis that no suspicion rested on the prisoners from the time of the murder up to February, 1924, when the identification parade took place. He said he was in a position to call evidence tending to show that the men had been about their homes from the time of the murder up to their arrest by the military, and this Court was asked to take such evidence now, though not produced at the trial when it was available. The Court is satisfied that leave should not be given to produce this evidence now. If real evidence of any value of this kind had been forthcoming, it would have been appropriate at the trial, apart altogether from the statements made by Superintendent Murphy. The defence deliberately, and upon due consideration, and very skilfully, pursued a certain line—no doubt the best line in the circumstances—and it is no part of the duty of this Court to provide opportunities for defending counsel to mend their hands when their plans have miscarried.

Court of Crim. App. 1924.

THE STATE v. KELLY AND GORMAN.

Kennedy C.J.

The jury's third question and answer were as follows:—

"*Foreman* (putting third question): 'Was it on Mrs. Atkinson's description that accused were identified by the authorities, and, if so, how soon after the arrest?'

"*Superintendent Murphy*: 'A month after the arrest.'

"MR. JUSTICE O'SHAUGHNESSY: 'Was it from the description of Mrs. Atkinson?'

"*Superintendent Murphy*: 'Oh, yes, my Lord.'

"*Foreman*: 'That is all we want to know.'"

Mr. Lynch and Mr. Lavery object that the question and answer were improper and illegal as hearsay evidence. Mr. Carrigan and Mr. Bewley, who admit that the jury should not be permitted to ask questions which would not be permissible for prosecuting counsel to ask, and who also admit that the question is not proper in form, contend that the question elicited nothing more than prosecuting counsel could have elicited by questions put in another form. They say that the same answer in substance could have been got by means of the following questions, which they say are recognised as legal and regular in ordinary practice, viz.:—

(*a*) Did Mrs. Atkinson supply a description of the men to the police?

(*b*) In consequence of that description, did you (the police) go to the prisoners' houses?

(*c*) Did you find the prisoners there?

(*d*) Did you visit their houses again and again without finding them?

(*e*) Did you trace them to the Curragh Internment Camp?

For the validity of these questions they rely on *R.* v. *Wink* (1); *R.* v. *Wilkins* (2); *R.* v. *Wainwright* (3). It is urged that the word "identification" is not to be taken in its literal sense, but rather in the sense of "selected from other prisoners in the Internment Camp and transferred to civil custody." This, however, would be to ignore the point of time referred to, namely, one month after arrest by the military and about six months before the transfer of the prisoners from military to civil custody.

Having weighed all the considerations offered to us on this matter with the utmost care, we have come to the following conclusions upon it:—

We are of opinion that the third question put by the jury was in the mind of the jury a crucial question in arriving at their verdict.

We are of opinion that that question was put by the jury for the purpose of testing the description of the persons who committed the crime given by Mrs. Atkinson the morning after the murder, though that description was not, in fact, in evidence, and could not have been given in evidence against the prisoners.

(1) 6 C. & P. 397. (2) 4 Cox, Cr. C. 92. (3) 13 Cox, Cr. C. 171.

We are of opinion that the meaning of the question and the substance of the evidence given in answer were that some person or persons referred to indefinitely as "the authorities"—probably the Civic Guard—shortly after the prisoners had fallen into the hands of the military, compared the prisoners with the description given by Mrs. Atkinson, and formed the opinion that the prisoners were the persons described by Mrs. Atkinson.

We believe that the jury in this way satisfied themselves that the identification of the prisoners by Mrs. Atkinson at the identification parade in February and at the trial tallied with her original description of the men, and we think it more than likely that the jury thought they should be so satisfied before finding a verdict.

We are of opinion that the substance of the evidence obtained by the jury by means of the third question was not legal or proper evidence against the prisoners, being a mixture of hearsay and opinion of unnamed persons, and that it could not by any device in forming questions have been got legally into evidence on the part of the prosecution against the prisoners, and we are satisfied that it was crucial in arriving at the verdict which depended entirely on identification.

We must, therefore, hold that the verdict cannot stand, and we are compelled in the circumstances to reverse the conviction.

No doubt the jury put their questions in an earnest desire to reach the truth in a grave case. No doubt the learned Judge at the trial was not asked by either side to disallow the question. Possibly, the result will be that the cowardly murder of a brave old man will go unpunished. Still, the greatest call is the strict, certain, and regular administration of justice, especially in criminal matters, and the duty of the Court is to answer that call, whatever the consequences.

Solicitor for the appellants: *J. Baldwin Murphy.*
Solicitor for the State: *M. A. Corrigan.*

C. L.

Sullivan P.
1924.

Feb. 20.
March 2.

FRANCIS LYNAM, PLAINTIFF, *v.* REVEREND MICHAEL BUTLER, DEFENDANT.

(1924. No. 5898.)

Landlord and tenant—Action for recovery of possession—Expiration of lease —Order declaring the holding to be one to which the Land Act, 1923, *applies — Effect of Order — Alteration in the relationship of landlord and tenant — Position of tenant — Rights conferred — Land Act,* 1923 (*No.* 42 *of* 1923), *sect.* 19, *sub-sect.* (3), *sect.* 24, *sub-sect.* (1), *sects.* 28, 29, 73, *sub-sect.* (2).

Sect. 24 (1) of the Land Act, 1923 (No. 42 of 1923), provides:—"Subject to the provisions of this Act and notwithstanding anything contained in any other enactment, all tenanted land wherever situated . . . shall by virtue of this Act vest in the Land Commission on the appointed day, in the like manner and with the like consequences as if vesting orders under the Land Purchase Acts had been made on the appointed day in respect thereof in pursuance of subsequent purchase agreements entered into by the Land Commission with the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts, at the price fixed by or under this Act."

M., being tenant for life of certain lands, demised them for the term of her life to B. On her death, L., being entitled in remainder in fee-simple, brought an action to recover possession of the lands from B. During M.'s lifetime B. had obtained an order from Wylie J. declaring that the lands constituted a holding to which the Land Act, 1923, applied. "The appointed day" mentioned in sect. 24 (1) of the Act had not been fixed.

Held, that the statutory rights conferred, and the liabilities imposed, on the tenant of a holding to which the Act applies are unaffected by the expiration of the tenancy before "the appointed day," and that the provisions of the Act deprived the plaintiff of any right to recover possession of the lands.

The alteration in the relationship of landlord and tenant effected by the Act considered.

TRIAL OF ACTION.

The plaintiff claimed possession of 1, the house, offices, and lands of Mount Seskin, situate in the parish of Tallaght, barony of Upper Cross, and County of Dublin; 2, that part of the lands of Mount Seskin, known as the Causeway Farm; and 3, the shooting and all other ground rights attached to the said lands.

Mary MacInerney was, on and prior to the 30th day of July, 1920, seized as tenant for life of the said hereditaments, and continued so seized until the day of her death. By an Indenture of Lease dated the 30th day of July, 1920, the said Mary MacInerney demised the hereditaments to the defendant for the term of her natural life. She died on the 22nd day of August, 1924.

The plaintiff claimed possession as owner in fee-simple of the hereditaments under the limitations contained in the will of Francis Lynam, his title having accrued on the death of the

said Mary MacInerney, the tenant for life. He also claimed mesne profits from the 22nd day of August, 1924.

The defendant in his defence stated—1, that he was in possession; 2, that by an Order of Mr. Justice Wylie, dated the 7th day of February, 1924, made in the Court of the Irish Land Commission in a Matter entitled Record No. 179; Landlord:—Mary MacInerney (above mentioned); Tenant:—Michael Butler (the defendant), it was declared that the said hereditaments and premises constituted a holding to which the Land Act, 1923, applied; and that by virtue and in consequence of the said Order the plaintiff was not entitled to the relief claimed; 3, the defendant further said that because of the said proceedings before Mr. Justice Wylie, to which proceedings the plaintiff was a party, the plaintiff was estopped from pleading that he was entitled to recover possession of the said hereditaments and premises; 4, the defendant further relied on the provisions of the Land Act, 1923, and the said Order of Mr. Justice Wylie then having jurisdiction in that behalf, as disentitling the plaintiff to the relief claimed.

The plaintiff in his reply said that, admitting for the purpose of this portion of his reply, the plaintiff was a party to the proceedings mentioned in the defence, the Order made by Mr. Justice Wylie did not, nor did any provision of the Land Act, 1923, prejudice or affect the right of the plaintiff to possession of the lands upon the death of the said Mary MacInerney prior to the vesting of the said lands in the Land Commission on "the appointed day" pursuant to sect. 24, sub-sect. 1, of the said Act. And that no day had been fixed by the Land Commission as "the appointed day" for the vesting in the Land Commission of the said lands, which have been and still were vested in the plaintiff for an estate in fee-simple; and the plaintiff submitted that the defence disclosed no answer in law to the plaintiff's claim.

Overend K.C. and *Marnan* (with them *Serjeant Hanna K.C.*), for the plaintiff:—The plaintiff has a right to possession which is unaffected by the Order of Wylie J. "The appointed day" has not been fixed, and consequently the lands have not yet vested in the Land Commission. The lands are vested in the plaintiff as owner in fee and, inasmuch as the defendant's lease has expired, the plaintiff is entitled to possession.

G. W. Walker K.C. and *H. J. Moloney,* for the defendant:—The Order of Wylie J. operates as an estoppel. At the date of the passing of the Act the defendant, who has been declared to be a tenant of a holding to which the Act applies, had acquired rights and incurred liabilities consistent only with his continuing in possession. Judgment for the plaintiff would defeat the ultimate object of the Act, which is to vest in persons in the position of the defendant the fee-simple of their holdings.

Sullivan P. 1924. LYNAM v. BUTLER.

If judgment is given for the plaintiff the extraordinary result will follow that the defendant will continue to make payments in lieu of rent up to "the appointed day," but his right of becoming the owner of the holding will have gone. [They cited *Hatchell* v. *Russell* (1).]

Cur. adv. vult.

March 2.

SULLIVAN P.:—

This action is brought to recover possession of the lands and premises of Mount Seskin, situated in the County Dublin, together with the shooting and other rights thereto attached. The plaintiff claims possession as owner in fee-simple of the lands under the limitations contained in the will of Francis Lynam, his title having accrued on the death of Mary MacInerney, the tenant for life, on the 22nd August, 1924.

By Indenture of Lease, dated the 30th July, 1920, the said Mary MacInerney demised the lands to the defendant for the term of her natural life, which term expired on the 22nd August, 1924. Under this lease the defendant was in possession of the lands at the date of the passing of the Land Act, 1923, *i.e.*, the 9th August, 1923, and he remained in possession thereof up to the present. On the 7th February, 1924, the defendant obtained from Mr. Justice Wylie an Order declaring that his holding under the said lease was a holding to which the said Act applied.

After the death of the said Mary MacInerney, the plaintiff's solicitors demanded possession of the lands from the defendant, and this being refused, the present action was instituted. The facts are not disputed. The only question argued on the hearing was whether the plaintiff is entitled to recover possession of the holding, having regard to the provisions of the Land Act, 1923.

Section 24, sub-section 1, of that Act provides that, subject to the provisions of the Act, all tenanted lands wherever situated shall, by virtue of the Act, vest in the Land Commission on the appointed day, in the like manner and with the like consequences as if vesting orders under the Land Purchase Acts had been made on the appointed day in respect thereof in pursuance of subsequent purchase agreements entered into by the Land Commission with the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts, at the price fixed by or under the Act. Section 73, sub-section 2, defines "tenanted land" as meaning "land held under any contract of tenancy other than a fee-farm grant, or lease renewable for ever for lives or years, or lease for a term of years of which sixty or more are unexpired at the date of the passing of this Act, or a letting for the purpose of temporary depasturage, agistment, or conacre, or for temporary convenience, or to meet a temporary necessity."

(1) 58 Ir. L. T. R. 163.

These sections of the Act were considered by Mr. Justice Wylie in the case of *Hatchell* v. *Russell* (1). In that case the lease to the tenant was, at the date of the passing of the Act, an existing lease of which less than sixty years were unexpired, but the term had expired at the time the case was heard. Mr. Justice Wylie held that in deciding whether a holding is, or is not, one to which the Act applies, the holding must be regarded as at the date of the passing of the Act, and he made an Order declaring that the holding was one to which the Act applied, notwithstanding the fact that the lease had expired at the time the Order was made.

In the present case the defendant, on February 7th, 1924, obtained from Mr. Justice Wylie a similar declaration. I accept these decisions as binding upon me, and I deal with the case on that basis.

It was argued on behalf of the plaintiff that Mr. Justice Wylie's Order does not affect the plaintiff's right to possession of the lands at the present time; that under section 24 of the Act the lands will not vest in the Land Commission until "the appointed day," that "the appointed day" has not yet been fixed, that the lands are now vested in the plaintiff as owner in fee, and that, the lease under which the defendant held having expired, the plaintiff is entitled to possession. Counsel for the defendant contended that at the date of the passing of the Act the defendant was the tenant of a holding to which the Act applied, and, as such, acquired certain rights and incurred certain liabilities under the Act which were consistent only with his continuance in possession of his holding; that the object of the Act was to vest in such tenants the fee-simple of their holdings, that this object would be defeated in this case should the plaintiff recover possession of the lands.

I have considered the provisions of the Act and in particular the provisions of sections 18 to 30, and I have come to the conclusion that the contention of defendant's counsel is right. It is unnecessary to refer to these sections at any length, it is sufficient for me to say that, as from the date of the passing of the Act, the relation of landlord and tenant in respect of holdings to which the Act applied was fundamentally altered, if not abolished. As from that date the tenant held the lands, not on the terms of his former tenancy, but under the provisions of the Act and subject to the conditions therein provided. His liability to the landlord for arrears of rent ceased, and proceedings could not be taken against him in respect thereof; and in lieu thereof a sum called "compounded arrears of rent" became payable to the Land Commission. Rent payable to the landlord ceased, and in lieu thereof a sum becomes payable to the Land Commission which is to be collectable according to rules made by the Land Commission, and is to continue to be payable up to "the appointed day." All the landlord's remedies for the recovery of rent are conferred upon the Land Commission

(1) 58 Ir. L. T. R. 163.

Sullivan P. 1924.

LYNAM v. BUTLER.

for the recovery of the statutory payments due to them. Ultimately, on "the appointed day," the tenant of every holding of tenanted land vested in the Land Commission by virtue of the Act (save certain holdings expressly excepted) shall be deemed to have entered into a subsequent purchase agreement for the purchase of the holding from the Land Commission at the standard price, and the holding will be subsequently vested in him by the Land Commission by vesting Order or otherwise.

It seems to me to be reasonably clear that the Act contemplates that the tenant of the holding at the date of the passing of the Act is the tenant who shall be deemed on "the appointed day" to have entered into the subsequent purchase agreement, and that he shall have the holding vested in him under section 28; or, in the case of a retained holding, have the rights conferred by section 29. This view is corroborated by the provisions in section 19, sub-section 3, that in any case where not less than three years' arrears of rent are due, the tenant may request that one half year's "compound arrears of rent" be added to the purchase-money and repaid by means of a purchase annuity at $4\frac{3}{4}$ per cent. on the amount thereof added to and consolidated with the standard purchase annuity for the holding. The tenant who is liable to pay "the compounded arrears of rent" is the tenant of the holding at the date of the passing of the Act, and if he can require any part of such indebtedness to be added to the purchase annuity it must be because he will subsequently become the person liable to pay such annuity—that is, the purchaser of the holding.

I am of opinion that the statutory rights conferred and the liabilities imposed on the tenant of a holding to which the Act applies are unaffected by the expiration of his tenancy before the appointed day.

It is legitimate to consider what would be the result in the present case if I held otherwise. The plaintiff would be entitled to recover possession of the lands, but on "the appointed day" the lands will vest in the Land Commission as tenanted lands, and the price will be fixed on that basis. In the meantime the plaintiff cannot let the lands, as no rent can be payable out of the holding having regard to section 20, sub-section 1, of the Act, and on "the appointed day" the land will, in fact, be untenanted. Lastly, the defendant, who has obtained a declaration that his holding is one to which the Act applies, would be deprived of the right of purchasing his holding owing to the delay of the Land Commission in fixing "the appointed day," for which he is in no way responsible. These considerations would seem to support the conclusion at which I have arrived. I hold that the provisions of the Land Act, 1923, have deprived the plaintiff of any right to recover possession of the lands mentioned in the Statement of Claim, and I dismiss this action with costs.

Solicitors for the plaintiff: *Daniel Purcell & Son.*
Solicitors for the defendant: *Justin M'Carthy & Co.*

T. C. T.

THE MARQUIS OF LANSDOWNE *v.* COUNTY COUNCIL OF THE COUNTY OF KERRY (1).

High Court. 1925. March 12.

Malicious injury—Woods cut down and trees carried away—Series of outrages—Motive not theft but destruction—Right to compensation.

Parties of men, acting in concert, entered the claimant's woods, which surrounded his residence, and cut down about 5,580 trees, during a period of three or four months in the year 1922, and the trees were taken away by these men and by others.

Held, that the damage was malicious and the claimant was entitled to compensation, the Court being of opinion that the outrage was not primarily actuated by the motive of theft, but was one of many attempts to overthrow all law and all security for property in the country.

APPEAL by the Minister for Finance from twelve awards made by the Circuit Judge for Kerry in favour of the respondent, Lord Lansdowne, in respect of twelve claims for compensation for malicious injury to the woods in and around Derreen, his residence, in County Kerry, in the year 1922.

The respondent's residence was set on fire and destroyed in the year 1922, and, having made a claim under the Damage to Property (Compensation) Act, 1923, he was awarded £15,400 for the destruction of the residence and of the furniture and effects therein.

With respect to the present claims for the malicious injury to the woods, from the evidence given before the Circuit Judge it appeared that during a period of three or four months in the year 1922 parties of men acting in concert entered the woods in question and cut down in all about 5,580 trees. These trees were taken away by these men and by others. The respondent lodged twelve applications for compensation in respect of the damage so caused to him, and upon the hearing it was argued on behalf of the State that he was not entitled to any compensation as the cutting down and taking away of the trees was simple larceny. The Circuit Judge held that the respondent was entitled to compensation, and made the twelve awards, amounting to £2,083. The Circuit Judge, in the course of his judgment, having stated that Lord Lansdowne (respondent) had a residence at Derreen, in the County of Kerry, and was an extensive landlord, and that his relations with the people had been friendly, continued: "During the period of the appalling terror through which this country has passed, certain woods, his (Lord Lansdowne's) property, were destroyed by the action of a body of men acting in concert, and who so acted during a period of three or four months. From what was proved before me I am satisfied that these desperadoes bore no malice to Lord Lansdowne personally, but were actuated by a feeling of hostility against all organised and civilized

(1) Before SULLIVAN P. and O'SHAUGHNESSY J.

High Court. 1925.

THE MARQUIS OF LANSDOWNE v. KERRY CO. COUNCIL.

society. I am quite satisfied on the evidence given before me, and which will be before the appellate tribunal, that the feeling which inspired them was a desire to be freed from the restraint of any law, whether human or divine. In this connection I am fortified by the fact that though thousands of pounds' worth of damage was done to Lord Lansdowne's property two years ago, the entire amount of reparation by way of conscience money he has received is some three pounds. This property has been destroyed by an illegal and immoral combination which was operating against all society. Holding, as I do, that this outrage, or series of outrages, was not actuated by the primary motive of theft, but was one of many attempts to overthrow all law and all security for property in this country, I decide that under sect. 6 of the Damage to Property (Compensation) Act (1), Lord Lansdowne is entitled to succeed, and in case there should be any question as to the basis on which I assess the compensation that I award I shall make my meaning clear. This property was of great commercial value. This is proved by Mr. Anderson, the expert employed by the State, whose evidence I accept in its entirety. He says that this timber as it stood before being cut down by the outlaws who committed this gross offence against our country was worth £2,083. It is on this basis that I measure the compensation I award, and I am convinced that it is in the best interest of the peace of the County of Kerry and the entire Saorstát that Lord Lansdowne should be paid this amount, and I decree accordingly. The amenity of Lord Lansdowne's residence has been destroyed and the beauty of that part of the county, which was a national asset, has been disfigured, but these facts in no way influence my decision."

From this judgment the Minister for Finance appealed to the High Court. The following were the grounds of the appeals:—1, That the applicant was not entitled to any compensation in respect of the damage alleged under the Damage to Property (Compensation) Act, 1923, having regard to sect. 6 of the said Act (1) and the several Acts incorporated therewith. 2, That the finding of the Circuit Court Judge that the applicant was entitled to the value of the trees alleged to have been taken away was wrong. 3, That the finding of the Circuit Court Judge that the alleged taking away of the trees was not consequential on the actual damage (if any) was wrong in law and in fact. 4, That the trees alleged to have been taken were not taken by such persons as would entitle the

(1) Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), sect. 6:—"The right to compensation under the Criminal Injuries Acts shall as respects any injury to which this Part of this Act applies be limited to compensation for the actual damage done to the property injured and shall not extend to any compensation for any loss consequential on such actual damage and in particular shall not extend to compensation for the loss of the use of the property injured or for the loss of mere pleasure or amenity."

applicant to compensation under the said Act, having regard to sect. 15 thereof.

Costello, for the appellant:—The acts were simple larceny. The motive was theft, and the respondent is not entitled to compensation: *Leyburn* v. *Armagh County Council* (1); *M'Dowell* v. *Corporation of Dublin* (2). This case is distinguishable from *Tyler & Sons* v. *Cork County Council* (3) and from *Congested Districts Board* v. *Mayo County Council* (4), where the theft was only consequential on the damage. Sect. 6 of the Damage to Property (Compensation) Act, 1923, destroys the basis of those decisions in cases within Part II of that Act, as the section excludes compensation for any loss consequential on actual damage.

Phelps K.C. and *Bernard Roche,* for the respondent:—The object of the cutting of the 5,580 trees was destruction, not larceny. It was preceded by the burning of the respondent's residence and six others and by the cutting and breaking of the appellant's fences. It was part of the campaign of violence. The respondent's award was right, and the appeal should be dismissed.

[They cited *Tyler & Sons* v. *Cork County Council* (3); *Congested Districts Board* v. *Mayo County Council* (4); *M'Cutcheon v. Londonderry County Council* (5).]

SULLIVAN P.:—

I am of opinion that we should not interfere with the awards made by the Circuit Judge. On reading the evidence I have come to the conclusion that it bears out his view that the damage was malicious. He says: "This outrage, or series of outrages, was not actuated by the primary motive of theft, but was one of many attempts to overthrow all law and all security for property in this country." I agree, and I base my judgment on that ground. The appeal must be dismissed.

O'SHAUGHNESSY J.:—I concur. I would just like to add that whenever the facts show a case to be within the principle laid down in *M'Dowell* v. *Dublin Corporation* (2) this tribunal should consider whether it will follow *M'Dowell's Case* or subsequent decisions. In my opinion these subsequent decisions have been largely discredited on general principles of law. In this case the primary motive was not theft, but destruction, and the applicant was properly held entitled to succeed.

Solicitor for the appellant: *T. J. Liston.*
Solicitor for the respondent: *E. J. Downing.*

H. H.

(1) [1922] 2 I. R. 58.
(2) [1903] 2 I. R. 541.
(3) [1921] 2 I. R. 8.
(4) 55 Ir. L. T. R. 4.
(5) 55 Ir. L. T. R. 97.

High Court. 1924. Nov. 21. 1925. March 25.

THE COMMISSIONERS OF INLAND REVENUE, APPELLANTS; THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, RESPONDENTS (1).

Revenue—Corporation Profits Tax—Claim for exemption—Meaning of the expression "company"—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *sect.* 52, *sub-sect.* 3—*Bank of Ireland—Holders of Stock—Whether members of a corporate body whose liability is limited*—21 & 22 *Geo.* 3, *c.* 16 (*Ir.*), *sects.* 6, 20, *and* 23.

In Part V of the Finance Act, 1920 (which deals with the Corporation Profits Tax), the expression "company" is defined by sect. 52, sub-sect. 3, to mean "any body corporate so constituted that the liability of its members is limited . . ."

The Bank of Ireland, which was established pursuant to the statute of the Irish Parliament, 21 & 22 Geo. 3, c. 16, was assessed to Corporation Profits Tax. On appeal, the Special Commissioners were of opinion that the Bank was not liable, but stated a case for the High Court.

Held by the High Court, that the liability of the members of the Bank under 21 & 22 Geo. 3, c. 16 (Irish), is unlimited in respect of the debts contracted by it, and accordingly that it is not a "company" as defined by the Finance Act, 1920, sect. 52, sub-sect. 3, and therefore is not liable to Corporation Profits Tax.

CASE STATED under the Finance Act, 1920, sect. 56, sub-sect. 6, and the Income Tax Act, 1918, sect. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice. The case stated was as follows:—

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on the 19th December, 1922, at Dublin, for the purpose of hearing appeals, the Governor and Company of the Bank of Ireland (hereinafter referred to as "the corporation") appealed against estimated assessments to Corporation Profits Tax as follows:—

Accounting Periods.	Net Amount of Profits (after deduction of the £500 allowance).	Assessments.	Relief under Section 31 of Finance Act, 1920.	Amounts payable.
	£	£	£	£
1st January, 1920, to 31st December, 1920,	564,000	28,200	2,820	25,380
1st January, 1921, to 31st December, 1921,	600,000	30,000	4,850	25,150

made upon the corporation under the provisions of Part V of the Finance Act, 1920.

(1) Before SULLIVAN P., O'SHAUGHNESSY and MURNAGHAN JJ.

2. The profits to which Corporation Profits Tax applies are set out in sub-sect. 2 of sect. 52 of the Finance Act, 1920. The relevant words are as follows:—

> "(2) The profits to which this Part of this Act applies are, subject as hereinafter provided, the following, that is to say:—
>
> > "(*a*) the profits of a British Company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments."

3. In sub-sect. 3 of the same section the following definitions are found:—

> "(3) In this Part of this Act—
>
> > "The expression 'Company' means any body corporate so constituted that the liability of its members is limited . . .
> >
> > "The expression 'British Company' means any company incorporated by or under the laws of the United Kingdom."

4. It is admitted that the corporation was incorporated by or under the laws of the United Kingdom; and the sole question for the decision of the High Court is whether the corporation is a "company" within the definition of that word in sub-sect. 3 of sect. 52 of the Finance Act, 1920, that is to say, whether the corporation is a "body corporate so constituted that the liability of its members is limited."

5. The following facts were admitted or proved:—

> By an Act of the Irish Parliament, 21 & 22 Geo. 3, c. 16 (1781–2), entitled "An Act for establishing a Bank, by the name of the Governor and Company of the Bank of Ireland," it was provided (*inter alia*):—
>
> (*a*) In sect. 1: "That it shall and may be lawful to and for Your Majesty, your heirs and successors, by commission under the great Seal of Ireland, to authorise and appoint any number of persons at any time after the first day of August next to take and receive all such voluntary subscriptions as shall be made on or before the 1st January, which shall be in the year of our Lord 1784, by any person or persons, natives or foreigners, bodies politic or corporate, for and towards the raising and paying into the receipt of Your Majesty's Treasury in this Kingdom, the sum of £600,000 sterling, to be paid in money, or by debentures which have been or shall be issued from Your Majesty's Treasury, by virtue of any Act or Acts of Parliament heretofore, and in this present session made in this Kingdom, bearing an interest at the rate of £4 per centum per annum, which debentures shall be taken at par from such subscriber or subscribers, and

High Court. 1924.

REVENUE COMMRS. *v.* BANK OF IRELAND.

be considered as money by the persons to whom the same shall be paid; for which sum so to be subscribed, a sum, by way of annuity, equal in amount to the interest upon said debentures, at the rate of £4 per centum per annum shall be paid at Your Majesty's Treasury in manner hereinafter mentioned."

(*b*) In sect. 3, that His Majesty might by letters patent, under the great Seal of Ireland . . . "incorporate all and every such subscribers and contributors, their executors, administrators, successors, or assigns to be one body politic and corporate by the name of the Governor and Company of the Bank of Ireland; and by the same name of the Governor and Company of the Bank of Ireland, to have perpetual succession, and a common Seal; and that they and their successors, by the name aforesaid, shall be able and capable in law, to have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, and hereditaments of what kind, nature, or quality soever, and also to sell, grant, alien, demise or dispose of the same; and by the same name to sue and implead, and be sued and impleaded, answer and be answered in Courts of Record, or any other places whatsoever, and to do and execute all and singular other matters and things by the name aforesaid, that to them shall or may appertain to do, subject nevertheless to the proviso or condition of redemption hereinafter mentioned."

(*c*) In sect. 6: "That the said corporation, so to be created and made, shall not borrow or give security by bill, bond, note, covenant, or agreement under their Common Seal or otherwise for any sum or sums of money exceeding in the whole the sum of £600,000; so that they shall not owe at any one time more than a sum equal to the said sum of £600,000, unless it be by future Act or Acts of Parliament; and if any more or further sums shall be borrowed or taken up by, or lent or advanced to such corporation under their Common Seal or otherwise, or for payment of which any bond, bill, note, covenant, agreement, or other writing shall be made, sealed, or given, then, and in such case all and every the person and persons who shall be a member or members of the said corporation, his and their respective heirs, executors and administrators shall in his and their respective private capacities be chargeable with and liable in proportion to their several shares and subscriptions to the repayment of such money which shall be so borrowed, taken up, or lent, with interest for the same in such manner as if such security had been a security for payment of so much money and interest for the same, sealed by such respective member or members of such corporation and delivered by him and them as

their respective acts and deeds, in proportion to their several shares and subscriptions as aforesaid; and that in every such case an action of debt shall and may be brought, commenced, prosecuted and maintained in any of Your Majesty's Courts of Record at Dublin by the respective creditor or creditors to whom any such security shall be made, or his or their respective executors or administrators against all and every and any one or more of the persons who shall be members of the said corporation, or all or any of their respective heirs, executors, or administrators in proportion to their respective shares or proportions as aforesaid; and therein recover and have judgment for him, her, or them in such and the like manner as if such security were respectively sealed by the respective person or persons who shall be so sued, or his or their respective ancestor or testator, or intestate, and by him and them executed and delivered as his or their respective act and deed; any condition, covenant, or agreement to be made to the contrary thereof in anywise notwithstanding; and if any condition, covenant, or agreement shall be made to the contrary, the same shall be and is hereby declared to be void."

(*d*) In sect. 17: "That no member of the said Corporation shall be, or be adjudged liable to be a bankrupt, within the intent and meaning of all or any of the statutes made against or concerning bankrupts, for or by reason of their stock or interest in the said corporation, and that no stock in the said corporation shall be subject or liable to any foreign attachments."

(*e*) In sect. 18: "That the said sum of £600,000, when paid in by the said subscribers, shall be the common capital and principal stock of the said Bank, and shall be transferable and assignable, and shall be deemed personal estate . . ."

(*f*) In sect. 20: That upon repayment by Parliament of the said sum of £600,000 and the annuity thereon, the corporation shall cease and determine (this provision was subsequently repealed by 31 Geo. 3, c. 22, sect. 1). Sect. 20 further provided that "in case of insolvency, that then, and in every such case, before any distribution or dividend shall be made of the said stock or the produce thereof, the said Governor and company shall be obliged in the first instance to apply the said stock and the produce thereof then in their hands, or a competent part of the same, to discharge and pay off the total sum of the debts which they shall owe to others; and in case the same shall not be sufficient to pay off and discharge such debts so due to others, that then each member of the said corporation shall in his, her, or their private capacity, according to the proportions of their respective interests in said

High Court. 1924.

REVENUE COMMRS. *v.* BANK OF IRELAND.

capital stock, be liable to the payment of said debts until the whole shall be discharged."

(*g*) In sect. 23: "That no act, matter, or thing, acts, matters, or things to be done by the said corporation of the Governors and Company of the Bank of Ireland, or by their successors, or by the Court of Directors of the said corporation, or by any sub-committee appointed or to be appointed by the said corporation shall forfeit, or subject, or make liable to forfeiture the particular private and personal estate, interest, stock and property of any member of the said corporation; but that notwithstanding any such act or acts, matter or matters, thing or things to be done by the said Governor and Company of the Bank of Ireland, or by the said Court of Directors or sub-committees as aforesaid, the estate, stock, interest and property, with the whole proceed, benefit, profit, and advantage thereof belonging to each and every member of the said whole corporation and his particular right, claim, and title thereunto, and to every part thereof, shall be and remain unforfeited, untouched, whole, safe, and entire to the proper use and benefit of each and every of the said members; subject nevertheless to the payment of all just debts contracted by the said corporation; any law, statute, usage, or custom to the contrary notwithstanding."

(*h*) In sect. 24: "That this Act shall be taken and deemed to be a public Act to all intents and purposes in all Courts within this Kingdom; and all Judges are hereby required to take notice thereof as such, without specially pleading the same."

6. The Royal Charter or Letters Patent under the Great Seal of Ireland granted under the above-mentioned Act (21 & 22 Geo. 3, c. 16) provides (*inter alia*):—

(*a*) That the subscribers and their successors "shall be and be called one body politic and corporate of themselves, in deed and in name, by the name of 'the Governor and Company of the Bank of Ireland,' with perpetual succession and a common seal."

(*b*) That the corporation may purchase and hold lands, and also purchase and acquire all goods and chattels "wherein they are not restrained by the said Act"; may dispose of the same; may sue and be sued; "and shall and may do and execute all and singular other matters and things by the name aforesaid, that to them shall or may appertain to do by virtue of the said Act or otherwise; subject nevertheless to the proviso and condition of redemption in the said Act mentioned, and to all and every other clauses, provisoes, and conditions in the said Act contained."

(*c*) That subscribers and assignees shall be members of the corporation.

(*d*) That the sum of £600,000 sterling, so to be subscribed as aforesaid, shall be the common capital and principal stock of the corporation, and that all or every person and persons, his, her, and their executors, administrators, successors, and assignees, according and in proportion to the sum or sums of money by him, her, or them respectively subscribed, shall have and be deemed to have an interest or share in the said principal stock and of and in the yearly fund of £24,000 granted by the said Act of Parliament.

(*e*) That the corporation shall be constituted as indicated, and that bye-laws, &c., may be made.

(*f*) That no person shall be qualified to vote at an election of Governor, Deputy Governor, or Directors, or for the making of bye-laws, or in any other matter, who has not, and has not for six months previously, £500 sterling or more share or interest in the capital stock of the corporation.

(*g*) That a Governor must have £4,000, a Deputy Governor £3,000, and a Director £2,000 in the said capital stock.

(*h*) That certain oaths shall be taken by the Governor, Deputy Governor, Directors, and members and officers of the corporation.

(*i*) That "no dividend shall at any time be made by the the said Governor and company, save only out of the interest, profit, or produce arising by or out of the said capital stock or fund; or by such dealing, buying, or selling as is allowed by the said Act of Parliament made in the twenty-first and twenty-second years of our reign, until redemption by Parliament of the said yearly fund of £24,000 sterling, and that no dividend whatsoever shall at any time be made without the consent of the members of the said corporation, in a General Court, qualified to vote as aforesaid."

(*j*) That four General Courts shall be held every year. At any time nine members may demand the holding of a General Court. Members may by a majority of votes remove the Governor, Deputy Governor, or Directors for misdemeanours or abuse of their offices.

(*k*) That the Governor, Deputy Governor and Directors shall and may act according to bye-laws, &c., and in the absence of such bye-laws, &c., they "shall and may direct and manage all the affairs and business of the said corporation, in the borrowing or receiving of moneys, and giving securities for the same, under the common seal of

High Court. 1924.

REVENUE COMMRS. *v.* BANK OF IRELAND.

the said corporation, and in their dealings in bills of exchange; or the buying and selling of bullion, gold, or silver; or in selling any goods, wares, or merchandises whatsoever, which shall really and *bona fide* be left or deposited with the said corporation, for money lent or advanced thereon, and which shall not be redeemed at the time agreed, or within three months after, or in selling such goods as shall or may be the produce of lands purchased by the said corporation; or in the lending or advancing any of the moneys of the said corporation and taking pawns or other securities for the same . . . and generally to act and do in all matters and things whatsoever which, by the said recited Act of Parliament, shall or may be done, in all matters and things whatsoever, which they shall judge necessary for the well ordering and managing of the said corporation, and the affairs thereof, and to do, enjoy, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said corporation, as fully to all intents and purposes as if the same were done by the Governor and Company of the said Bank of Ireland, or by a General Court of the same; subject nevertheless to such restraint, limitations, rules, or appointments as are contained in the said recited Act of Parliament for or concerning the trade, business, or affairs of the said corporation, or otherwise relating thereunto."

(*l*) That the General Court may make bye-laws: "so as that such bye-laws be not repugnant to the laws of our Kingdom of Ireland, and be confirmed and approved according to the statutes in such case made and provided."

(*m*) That the capital stock and yearly fund of the corporation shall be assigned and transferred in the manner indicated.

(*n*) And that "Our will is, and we do for us, our heirs and successors, grant and declare, that our said Letters Patent, or the enrolment thereof, shall be in and by all things valid and effectual in the law, according to the true intent and meaning of the same; and shall be taken, construed, and adjudged in the most favourable and beneficial sense, for the best advantage of the said corporation, as well in our Court of Record as elsewhere, notwithstanding any non-recital, mis-recital, defect, uncertainty, or imperfection in our said Letters Patent.

"And our will and pleasure further is, and we do hereby for us, our heirs, and successors covenant, grant, and agree to and with the said Governor and Company and their successors, that we, our heirs and successors shall and will from time to time and at all times hereafter upon the humble suit and request of the said

Governor and Company and their successors give and grant unto them all such further and other powers, privileges, authorities, matters and things which we or they can or may lawfully grant, and as shall be reasonably advised and devised, by the counsel learned in the law of the said Governor and Company for the time being and shall be approved by our Attorney- or Solicitor-General of our said Kingdom of Ireland in our behalf."

7. The Rules, Orders, and Bye-Laws for the good government of the corporation of the Governor and Company of the Bank of Ireland provide (*inter alia*):—

(*a*) In Bye-Law No. III: "That the seal of this corporation shall be carefully kept under three locks, the three keys whereof shall be severally kept by such three of the Governor, Deputy Governor, and Directors for the time being as the Court of Directors from time to time shall empower to keep the same, and that the said seal shall not be affixed or set to any paper or parchment, writing or instrument whatsoever but by an order of the Court of Directors for that purpose first had and obtained, and also in the presence of three or more of the Governor, Deputy Governor, and Directors for the time being."

(*b*) In Bye-Law No. V: That a Court of Directors shall be held once in every week "at least" . . . and "that no money shall be lent upon any other sort of security, or in any other proportion, or to any other value, or otherwise disposed of, than what, or as shall be, from time to time, first directed by the said Court of Directors; and that every sub-committee shall weekly lay before the said Court of Directors, so to be held as aforesaid, an account of what moneys are, or shall be then owing by this corporation under their common seal, and what securities shall have been taken, or other business transacted or negotiated by them, touching this corporation, during the then last preceding week."

(*c*) In Bye-Law No. VI: That where the Governor, Deputy Governor, and Directors, upon their own account, or with others, shall have any dealings with the corporation, they shall declare and publish to the sub-committee their share and interest in such dealings and the particular circumstances thereof.

(*d*) In Bye-Law No. VIII: "That the Governor, Deputy Governor, and Directors, or any of them, shall not at any time hereafter, without the consent and direction of a General Court first had, wittingly or willingly borrow, owe, or give security under the common seal for any sum or sums of money exceeding in the whole at any one time £600,000, or procure the borrowing,

High Court. 1924.

REVENUE COMMRS. *v.* BANK OF IRELAND.

owing, or giving security for any such further sum or sums of money by bill, bond, or other covenant or agreement under the common seal of this corporation as aforesaid, and in case the common seal shall be set or affixed to any bill, bond, or other agreement for money, contrary to this ordinance or bye-law, that then each and every the Governor, Deputy Governor, and Directors, or other members of this corporation who shall order, procure, consent, agree to, or wittingly approve of the same, and be thereof lawfully convicted, shall for every such offence severally forfeit to the said Governor and Company of the Bank of Ireland the sum of £1,000 sterling, and also all such further and other sum or sums of money as the said Governor and Company of the Bank of Ireland shall be damnified for or by reason thereof."

8. In an Act of the Irish Parliament, 31 Geo. 3, c. 22, it was recited that the sum of £600,000 had been subscribed and paid by debentures, and that His Majesty by Letters Patent had incorporated the subscribers into one body politic and corporate by the name of the Governor and Company of the Bank of Ireland, and it was provided (*inter alia*):—

(*a*) In sect. 1: That the part of sect. 20 of 21 & 22 Geo. 3, c. 16 (referred to in paragraph 5 (*f*) above) relating to the determination of the corporation, should be repealed (this provision was substantially repealed by the Statute Law Revision (Ir.) Act, 1879, but not so as to affect the previous repeal), and "that the said Governor and Company of the Bank of Ireland and their successors for ever shall remain, continue, and be one body corporate and politic by the name of the Governor and Company of the Bank of Ireland aforesaid, and shall for ever have, receive, and enjoy the said annuity of £24,000, together with all abilities, capacities, powers, authorities, franchises, exemptions, privileges, profits, and advantages whatsoever to which the said Governor and Company of the Bank of Ireland now are, or before the making of this Act were entitled by the said recited Act and Charter."

(*b*) In sect. 2: That the corporation might by order of the Lord Lieutenant be dissolved at any time after the 1st January, 1816, upon twelve months' notice or previously by and with the desire of the corporation upon payment of the sum of £600,000 and the annuity thereon (subsequently repealed by 48 Geo. 3, c. 103, sect. 1).

(*c*) In sect. 3: That the capital stock of the corporation might be increased to £1,000,000 (repealed by the Statute Law Revision (Ir.) Act, 1879), and that the additional subscribers, upon making full payment for such additional stock, should at all times be members of the corporation and incorporated therein, "and shall be

entitled unto, and have, hold, and enjoy all the benefits, privileges, advantages, and immunities, and be subject and liable to all the regulations, rules, and orders to which the present stock-holders and members of the said corporation in respect of the stock held by and belonging to them, are respectively entitled subject and liable unto by the said Act of Parliament and Charter, or by any bye-laws of the said corporation or otherwise howsoever."

(*d*) In sect. 7: "That from the time the said sum of £400,000 shall be subscribed and paid in the said corporation may borrow or give security for any sum or sums, so that they shall not owe at any one time more than a sum equal to the said sum of £1,000,000, anything in the said Act contained to the contrary notwithstanding."

9. In an Act of the Irish Parliament, 37 Geo. 3, c. 50, it was recited that the further sum of £400,000 was subscribed and paid, and it was provided (*inter alia*):—

(*a*) In sect. 1: That the capital stock of the corporation might be increased to £1,500,000 (repealed by the Statute Law Revision (Ir.) Act, 1879), and that the subscribers upon making full payment should at all times be members of the corporation upon the same conditions as heretofore.

(*b*) In sect. 5: "That from the time the said sum of £500,000 shall be subscribed and paid in, the said corporation may borrow or give security for any sum or sums so that they shall not owe at any one time more than a sum equal to the said sum of £1,500,000, anything in the said Act contained to the contrary notwithstanding."

(*c*) In sects. 6 and 7: That the said sum of £500,000 should be lent to His Majesty at 5 per cent. per annum—a further annuity of £3 12s. 6d. per cent. per annum was also payable in respect of this loan for nineteen years (repealed by Statute Law Revision (Ir.) Act, 1879).

(*d*) In sect. 10: That in respect of the loan to His Majesty of £600,000, the annuity of £24,000, subsequently increased to £25,500, should be further increased to £30,000 (repealed by Statute Law Revision (Ir.) Act, 1879).

(*e*) In sect. 11: That if the corporation should be dissolved, the principal sums of £600,000 and £500,000, together with the annuities thereon, should be repaid to the corporation (repealed by Statute Law Revision (Ir.) Act, 1879).

10. In the Act of Parliament, 48 Geo. 3, c. 103, it was recited

High Court. 1924.

REVENUE COMMRS. v. BANK OF IRELAND.

that the further sum of £500,000 was subscribed and paid, and it was provided (*inter alia*) :—

(*a*) In sect. 1 : That so much of 31 Geo. 3, c. 22, as relates to the determining of the annuity therein mentioned and to the dissolving of the corporation should be repealed (see paragraph 8 (*b*) above)—(this provision was subsequently repealed by the Statute Law Revision Act, 1872 (No. 2)) : "That the said Governor and Company of the Bank of Ireland and their successors for ever shall remain, continue, and be one body corporate and politic by the name of 'The Governor and Company of the Bank of Ireland' aforesaid . . . with all abilities, capacities, powers, authorities, franchises, exemptions, privileges, profits, and advantages whatsoever to which the said Governor and Company of the Bank of Ireland now are, or before the passing of this Act were entitled by the said several hereinbefore recited Acts or any of them, and by their Charter, and the said Governor and Company and their successors shall be and are hereby freed and discharged from the said condition of redemption."

(*b*) In sect. 3 : That the capital stock of the corporation might be increased by £1,000,000 to £2,500,000 (repealed by the Statute Law Revision Act, 1872 (No. 2)), and that the subscribers thereto, upon making full payment for such additional stock, should at all times be members of the corporation upon the same conditions as heretofore.

(*c*) In sect. 7 : "That from the time the said sum of one million shall be subscribed and paid in under the provisions of this Act, the said corporation may borrow or give security for any sum or sums so that they shall not owe at any one time more than a sum equal to the said sums of £2,500,000 and £250,000, anything in the said hereinbefore recited Acts or any of them contained to the contrary notwithstanding."

(*d*) In sects. 8 and 9 : That the corporation might lend the said sum of £1,250,000, Irish currency, to His Majesty at 5 per cent. per annum (repealed by the Statute Law Revision Act, 1872 (No. 2)).

(*e*) In sect. 10 : That the corporation might by order of the Lord Lieutenant be dissolved at any time after the 1st January, 1837, upon twelve months' notice, or previously by and with the desire and consent of the corporation, upon payment of the principal sums and annuities due to the corporation (repealed by the Statute Law Revision Act, 1872 (No. 2)).

(*f*) In sect. 11 : That if the whole of the said sum of £1,250,000 should not be paid into the Exchequer of Ireland before the 4th January, 1809, or should not be

subscribed before the 24th June, 1809, the corporation should be subject to be dissolved (repealed by the Statute Law Revision Act, 1872 (No. 2)).

(*g*) In sects. 12 and 13: The Lord High Treasurer of Ireland might, before the 1st January, 1837, repay to the corporation the said sum of £1,250,000, and that in that event the said sum should be invested in Government securities, and remain so invested during the continuance of the corporation under this Act (repealed by the Statute Law Revision Act, 1872 (No. 2)).

11. By the Act of Parliament, 1 & 2 Geo. 4, c. 72, the corporation was authorised to advance to His Majesty the sum of £500,000, Irish currency, at 4 per cent. per annum (repealed by the Statute Law Revision Act, 1873), and it was provided (*inter alia*):—

(*a*) In sect. 3: That the capital stock of the corporation should be increased from £2,500,000, Irish currency, to £3,000,000, Irish currency, the proposed increase to be appropriated amongst the proprietors of the capital stock of the corporation, such proprietors to possess and enjoy the same profits, privileges, and advantages in respect thereof as heretofore.

(*b*) In sect. 4: That the capital stock of the corporation, together with the produce thereof, should be free from Parliamentary taxes, charges and impositions, and all other taxes, charges, and impositions whatsoever.

(*c*) In sect. 5: That until repayment of the said sum of £500,000, Irish currency, notes of the Bank of Ireland should be received in payment of the public revenue.

12. Copies of the Acts of Parliament above mentioned and of the Charter and Bye-Laws of the corporation are annexed hereto, and form part of this case.

13. It was contended on behalf of the corporation:—

(*a*) That sect. 6 (see paragraph 5 (*c*) of this case) and sect. 20 (see paragraph 5 (*f*) of this case) of 21 & 22 Geo. 3, c. 16, clearly establish the fact that the members of the corporation are liable to pay the debts of the corporation in full, without any limitation of their liability.

(*b*) That by subsequent enactments the liability of additional members of the corporation was placed on the same footing as that of the original members.

(*c*) That, therefore, the corporation is not so constituted that the liability of its members is limited.

14. On behalf of the Revenue it was contended:—

(*a*) That the enactments referred to are not open to the interpretation placed upon them by the corporation.

High Court. 1924.

REVENUE COMMRS. v. BANK OF IRELAND.

(*b*) That sect. 6 of 21 & 22 Geo. 3, c. 16, as amended by subsequent legislation, places a limit upon the corporation's indebtedness, and consequently limits the liability of the members of the corporation.

(*c*) That the contention of the corporation is at variance with the statement which appears each year, with the authority of the corporation, in the "Stock Exchange Year Book," as follows:—"As regards any liability on the stock, eminent counsel 'are of opinion that the holders of Bank of Ireland stock are not liable for any debts or engagements of the Bank.' "

15. Having considered the facts and contentions herein set forth, we were of opinion that the corporation is not "so constituted that the liability of its members is limited," and that consequently it is exempt from liability to Corporation Profits Tax. We, therefore, discharged the assessments.

16. Whereupon the Inspector of Taxes, who appeared for the Revenue, declared to us his dissatisfaction with our determination as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court, pursuant to the Finance Act, 1920, sub-sect. 6 of sect. 56, and the Income Tax Act, 1918, sect. 149. This case is stated and signed accordingly.

17. Should the decision of the Court be in favour of the Revenue, the case is to be remitted to us for any amendments which may be found to be necessary in the amounts of the estimated assessments, the figures as regards liability not having been agreed upon.

Serjeant Hanna K.C., M'Cann K.C., and *Costello,* for the appellants:—The statute, 21 & 22 Geo. 3, establishing the respondent corporation, is not open to the interpretation placed upon it by the Special Commissioners. Sect. 6 of that statute, as amended by subsequent legislation, placed a limit on the corporation's indebtedness, and limited the liability of the members for the sums borrowed in excess of the amount allowed to a proportionate part thereof, and so the liability of the members is limited. Sect. 20 limits the liability of each member to an amount of the debts proportionate to the member's interest in the capital stock of the corporation.

S. L. Brown K.C., H. Wilson K.C., and *Oliver Murphy,* for the respondents:—Sect. 20 of 21 & 22 Geo. 3 enacts that the members of the corporation are liable to pay the debts of the corporation, without any limitation on that liability. This liability on the part of original members was extended to additional members by later statutes, and now all the members are so

liable. Their liability is unlimited. The corporation, being therefore outside the definition of "company" contained in the Finance Act, 1920, sect. 52, sub-sect. 3, is exempt from Corporation Profits Tax.

Cur. adv. vult.

SULLIVAN P.:—This case came before this Court on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts. The Governor and Company of the Bank of Ireland having been assessed to Corporation Profits Tax under the provisions of Part V of the Finance Act, 1920, appealed against the assessment to the Commissioners for the Special Purposes of the Income Tax Acts. The Commissioners, being of opinion that the Governor and Company of the Bank of Ireland were exempt from liability to such tax, discharged the assessments, and, on the application of the Inspector of Taxes, stated a case for the opinion of this Court to decide if their determination was correct in point of law. The only question we are asked to decide is, whether the respondents are a "Company" within the definition of that word given in sect. 52, sub-sect. 3 of the Finance Act, 1920, *i.e.*, a body corporate so constituted that the liability of its members is limited.

The respondents were incorporated by Letters Patent issued under the authority of the Act, 21 & 22 Geo. 3, c. 16. That Act empowered His Majesty by Commission under the Great Seal to authorise and appoint any number of persons to receive voluntary subscriptions for raising and paying into the Treasury the sum of £600,000, for which sum so subscribed a sum by way of annuity equal to interest at the rate of 4 per cent. per annum should be paid by the Treasury. Section 3 of the Act authorised His Majesty by Letters Patent to incorporate all such subscribers in one corporate body by the name of the Governor and Company of the Bank of Ireland, to have perpetual succession and a common seal. Section 6 prohibited the said Corporation from borrowing or giving security for any sums of money exceeding in the whole £600,000, and provided that should any further sums be borrowed all the members of the corporation should, in their private capacities, be liable in proportion to their several shares to the repayment of the same. Section 9 imposed certain restrictions on the trading of the corporation in goods, wares and merchandise. Section 18 provided that the sum of £600,000 should be the common capital and principal stock of the Bank, and that a yearly sum of £24,000 should be payable by the Treasury to the Bank in respect of the sum of £600,000 so paid as aforesaid, to be applied to the use of the members of the corporation rateably in proportion to their respective shares in the capital and stock of the Bank. Section 20 provided that upon repayment by Parliament of the sum of £600,000, and the annuity thereon,

High Court. 1925.

REVENUE COMMRS. *v.* BANK OF IRELAND.

Sullivan P.

or in case of insolvency, the stock and produce thereof should be applied in discharging the debts due, and that in case the same should be insufficient each member of the corporation in his private capacity, according to the proportion of his interest in the capital stock, should be liable to pay the debts. Section 21 obliged the Governor and Company to make dividends of the money arising from the annuity and other net profits of the Bank every six months to the members of the corporation according to their respective shares in the capital stock. Section 23 protected the private estate, stock and property of any member from forfeiture by reason of any act done by the corporation, its directors or committees.

Letters Patent duly issued on the 10th May, 1783, reciting the provisions of the Act, 21 & 22 Geo. 3, c. 16, the appointment by Letters Patent of Commissioners to receive subscriptions, the payment to them of the sum of £600,000 by certain persons therein named, and the further payment thereof into the Treasury by the said Commissioners. These Letters Patent incorporated the subscribers of the said sum as a corporate body with the name of the Governor and Company of the Bank of Ireland; declared that the sum of £600,000 should be the common capital and principal stock of the corporation, and that all such subscribers should have an interest or share in the said stock and yearly fund of £24,000 according and in proportion to the sum subscribed by them respectively.

By subsequent statutes referred to in the Case Stated, the capital stock was increased to the sum of £3,000,000, the borrowing power increased to the same amount, and the annuity increased to £65,769 4s. 8d. The liability of the additional members was placed on the same footing as that of the original members.

No question arises on the terms of the Letters Patent or on the provision of these later statutes.

We are asked in this case to determine whether the corporation so constituted is liable to Corporation Profits Tax.

Corporation Profits Tax is a tax imposed by the Finance Act, 1920. Section 52 of that Act imposes the tax on:—

(*a*) The profits of a British Company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments:

(*b*) The profits of a foreign company carrying on in the United Kingdom any trade or business, or any undertaking of a similar character, so far as those profits arise in the United Kingdom.

Sub-sect. 3 of the same section defines the expression "Company" as meaning "any body corporate so constituted that the liability of its members is limited . . . ," and defines the expression "British Company" as meaning "any company incorporated by or under the laws of the United Kingdom."

The respondents admit that they were incorporated under the laws of the United Kingdom, but they contend that they are not a "Company" as defined by sub-sect. 3 of sect. 52, viz.: a body corporate so constituted that the liability of its members is limited. This is the only question raised by the Case Stated for our decision.

Counsel on behalf of the appellants—the Commissioners of Inland Revenue—contended:—1. That the word "limited" in sub-sect. 3 of sect. 52 cannot be confined to such a limitation of liability as is described in the Companies Acts, 1862–1908—that it means "not unlimited." 2. That the liability of the members of the respondent corporation is limited by sects. 6, 20, and 23 of 21 & 22 Geo. 3, c. 16.

Counsel for the respondents disputed each of these contentions.

The first of these contentions seems to me to be well founded. The liability to Corporation Profits Tax is imposed on *any* company incorporated under the laws of the United Kingdom, whether incorporated under the Companies Acts or otherwise; and also on foreign companies carrying on business in the United Kingdom. This being so, I see no reason why the words used in defining "Company" should receive any limited construction, and I accordingly decline to construe the word "limited" as meaning "limited in the manner prescribed by the Companies Acts and not otherwise." I construe the word "limited" as meaning "not unlimited."

It is now necessary to consider whether the liability of the members of the respondent corporation is limited. Counsel for the appellants relied on three sections of 21 & 22 Geo. 3, c. 16, viz., sects. 6, 20, and 23, in support of their argument on this branch of the case.

Section 6 expressly prohibits the corporation from borrowing or giving security for sums exceeding in the whole the sum of £600,000, so as to limit its indebtedness to that sum. It then provides that should such prohibition be disregarded and any further sums borrowed, the members of the corporation in their private capacities are to be liable in proportion to their shares and subscriptions to the repayment of the same with interest, as if the security given by the corporation had been a security given by the respective members of the corporation under their respective seals and delivered by them as their respective deeds in proportion to their several shares and subscriptions. It further provides that in every such case an action of debt may be brought by the respective creditors to whom any such security shall be made against all and any of the members of the corporation in proportion to their respective shares as aforesaid, and judgment recovered as if such security were sealed and delivered by the person or persons so sued.

The effect of the section is that the corporation has no power to borrow beyond the limit prescribed: should it in

High Court. 1925.

REVENUE COMMRS. v. BANK OF IRELAND.

Sullivan P.

fact do so, then the liability for sums borrowed in excess of the limit so prescribed attaches as a personal liability to the members of the corporation, each member becoming personally liable for a portion of such sums in proportion to such member's share. In respect of the sums so over-borrowed, each member's liability cannot exceed his proportionate part thereof, and as to such sums there is a limit to his liability.

Section 20 provides that in case of insolvency, before any distribution shall be made of the stock or produce thereof, the Governor and Company shall be obliged, in the first instance, "to apply the said stock and the produce thereof then in their hands, or a competent part of the same, to discharge and pay off the total sum of the debts which they shall owe to others; and in case the same shall not be sufficient to pay off and discharge such debts so due to others, that then each member of the said corporation shall, in his, her, or their private capacity, according to the proportions of their respective interests in the said capital stock, be liable to the payment of said debts until the whole shall be discharged."

Counsel on behalf of the appellants contended that this section limits the liability of each member to an amount of the debts proportionate to the member's interest in the capital stock of the corporation. I cannot accept this construction of the section. In my opinion the meaning and effect of this section is that in case of the insolvency of the corporation, if the stock and produce thereof are insufficient to pay the debts in full, each member of the corporation is liable to pay such debts; that such liability, though according to the proportion of each member's interest in the capital stock, is not limited to a proportionate part of the debts; all the members are liable to the payment of the debts in proportion to their shares, but if they cannot all pay, those who can must, in proportion to their shares, make up the deficiency. This seems to me to result from the concluding words of the section, which are that each member shall be liable to the payment of the said debts "until the whole shall be discharged." If the words "according to the proportions of their respective interests" were construed as limiting the liability of each member to an amount of the debts proportionate to his interest in the capital stock, the result would be that should any of the members be insolvent or unable to pay their proportionate parts, the debts would not be paid in full. I cannot adopt a construction of the section which renders the concluding words of it inoperative. In my judgment the liability of each member of the corporation under this section is unlimited.

The only other section relied on by appellant's counsel is sect. 23. That section provides that no act done by the corporation or by its Court of Directors, or by any sub-committee, shall forfeit or make liable to forfeiture the particular private and personal estate, interest, stock and

property of any member of the corporation; but that notwithstanding any such act to be done by any of the bodies aforesaid, the estate, stock, interest, and property with the whole proceeds, benefit, profit, and advantage thereof belonging to each member, and his right and title thereto, and to every part thereof, shall remain unforfeited, untouched, whole, safe, and entire to the proper use and benefit of each member; subject nevertheless to the payment of all just debts contracted by the corporation.

It was contended on behalf of the appellants that this section applied to torts committed by the corporation, or its directors or committees, and exonerated the members from liability therefor. It is difficult to see how the commission of a tort, not amounting to a felony, could involve a forfeiture of estate, or how a tort committed by the corporation could affect the estate or property of any member until a judgment had been recovered in an action brought in respect thereof, in which event the judgment debt would be a just debt contracted by the corporation, the liability for which is expressly preserved by this section. But it is sufficient in the present case to say that whatever be the scope of the section it expressly recognizes the liability of the personal estate of the members to the payment of the debts contracted by the corporation, and that on such liability it imposes no restriction or limitation.

Having come to the conclusion that, on the construction of the said sections, the liability of the members of the respondent corporation is unlimited in respect of the debts contracted by it, it follows that in my opinion the respondent corporation is not a company as defined by sect. 52 (3) of the Finance Act, 1920.

I am, therefore, of opinion that the decision of the Commissioners for the Special Purposes of the Income Tax Acts is correct in point of law. The question raised by the Case Stated should be answered accordingly.

O'SHAUGHNESSY J.:—I concur. I do not think it necessary to add anything to the judgment of the President. The sections are, in my opinion, so clear that it would be impossible to come to any other conclusion than that expressed by my learned colleague without a straining of words. The liability of the members of this particular corporation is clearly unlimited.

MURNAGHAN J.:—

The liability of the body corporate known as the Governor and Company of the Bank of Ireland to pay the tax known as Corporation Profits Tax, depends upon whether this body is covered by the description of "a body corporate so constituted that the liability of its members is limited" contained in

High Court. 1925.

REVENUE COMMRS. v. BANK OF IRELAND.

Murnaghan J.

sect. 52 (3) of the Finance Act, 1920. There is at common law no liability upon the members of a body corporate in their private capacities in respect of the debts and liabilities of the body corporate and such liability in respect of the corporate acts must be created by statute.

The Bank of Ireland was created in pursuance of a statute of the Irish Parliament, 21 & 22 George 3, c. 16, and, in its main outlines, the constitution of the Bank was modelled upon that of the Bank of England, created by statute in the year 1694. The plan adopted was that the members of the body corporate should be the subscribers of money lent to the Government, in return for which loan the Bank should receive an annual payment by way of interest. Upon the security of the amount due by the Government the Bank could borrow from private persons, but any borrowing over the amount so secured was *ultra vires*, and for any excessive borrowing the liability was not that of the Bank but of its members *pro rata* according to the stock held by them, in other words, the amount of money originally subscribed. Numerous Acts amended the constitution of the Bank of England, the original limitation upon the amount of its stock was removed, and power was given to call upon its stockholders to the amount of the stock held by them together with all dividends theretofore paid. The national institution in England soon reached a position of acknowledged stability, and although most of the sections in the Act creating the Bank of Ireland were copied literally from the English Acts creating the Bank of England, I have been unable to find any section in those Acts similar to sect. 20 of the Irish Act, upon the terms of which the arguments in the case have mainly turned.

By that section provision was made for repayment by the Irish Government to the Bank by means of debentures, and it was provided that upon repayment the corporation should determine, and in case of such determination, or in case of insolvency "that then, and in every such case, before any distribution or dividend shall be made of the said stock or the produce thereof, the said Governor and Company shall be obliged in the first instance, to apply the said stock and the produce thereof then in their hands, or a competent part of the same, to discharge and pay off the total sum of the debts which they shall owe to others; and in case the same shall not be sufficient to pay off and discharge such debts so due to others, that then each member of the said corporation shall in his, her, or their private capacity, according to the proportions of their respective interests in the said capital stock, be liable to the payment of said debts, until the whole shall be discharged." The interpretation of this section is clearly this, that if the debentures given by the Government are insufficient to pay the corporate debts, the members are liable *pro rata* according to their amounts of stock until the entire corporate

debts have been discharged. The only manner in which this liability could have been put in suit would have been by a bill in equity, and the decree must have been similar to the orders made in winding up an unlimited company. In winding up such a company the members are liable to calls until the entire amount of the liabilities of the company have been discharged, but they can only be called upon *pro rata* according to their interest in the company.

In my opinion the holders of stock in the Bank of Ireland are not members of a body corporate which is so constituted that the liability of its members is limited, and, accordingly, the Bank is not liable to pay Corporation Profits Tax.

Solicitor for the appellants: *The Revenue Solicitor.*
Solicitor for the respondents: *C. J. Rutherfoord.*

H. H.

Johnston J. 1924. Oct. 28. Nov. 21, 24.

ITA HOWARD, AN INFANT, BY HANNAH TERESA BYRNE, HER NEXT FRIEND, PLAINTIFF; BERGIN, O'CONNOR, & Co., DEFENDANTS.

(1924. No. 7802.)

Supreme Court. 1925. Jan. 30. Feb. 3, 4. March 31.

Negligence—Escaped bullock—Terrified when being unloaded from a train—Running unattended through the streets of city — Injury to person walking along street—Mischievous propensity—Scienter—Novus actus interveniens—Servant obtaining assistance—Scope of authority.

Defendants purchased cattle in the country, and sent them by train to Dublin. A special place for the unloading of cattle was provided at the railway terminus, surrounded with strong wooden fences to prevent the cattle escaping when being unloaded. The cattle were not unloaded at this place, but at the end of the passenger platform, where there are no cattle pens. This place is surrounded by a wall, and has a gate opening on to the public road. Defendants' foreman cattle drover and another of their drovers unloaded the cattle, but neither of them closed the gate leading to the public road. Defendants' foreman admitted that cattle were liable to take fright when they were being unloaded, and that precautions were necessary. During the unloading two bullocks "got wild" on the platform, rushed upon the adjoining ground, were driven back, escaped through the gate, and ran through the streets of the city. While driving the rest of the cattle to defendants' premises, the foreman drover met H., another drover, whom he knew, and asked him to go in search of the two missing bullocks. Having found them in a yard off a lane, H. left them there and returned and informed the defendants' foreman, who sent H. and one of the defendants' drovers to bring back the two bullocks. Meantime the bullocks, having entered the yard, did damage; and the owner of the yard drove them out to save his goods from destruction. Continuing to run through the streets, one of these bullocks knocked down and injured the plaintiff, who sued the defendants for damages for the personal injuries caused by the negligence of the defendants' servants.

At the trial of the action the jury found that at the time of the occurrence the bullock that injured the plaintiff was in the public street unattended by any servant of the defendants; that the defendants' men did not take proper precautions at the unloading of the cattle to prevent them escaping on to the public street, inasmuch as the cattle should have been unloaded at the proper unloading place; that the defendants' servants were not guilty of negligence in not following the two bullocks and getting them under proper control, but that if H. were to be regarded as one of the defendants' men he was guilty of negligence in leaving the bullock at the yard where he saw it. They assessed damages at £250. Upon these findings Johnston J. gave judgment for the defendants, on the ground that there was no evidence of negligence on the part of the defendants connected with the damage suffered by the plaintiff.

Held by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), reversing Johnston J., that the judgment entered for the defendants must be set aside, and (FitzGibbon J. dissenting) that judgment should be entered for the plaintiff.

Held by FitzGibbon J., that there should be a new trial of the action.

Per Kennedy C.J.: The expression, a "mischievous propensity" in animals, *mansuetae naturae*, is not limited to something of a chronic character, but may be a passing and temporary phase of the character or temper of the particular animal, as well as a chronic or permanent element

of its nature; that the bullock that injured the plaintiff on emerging from the railway waggon displayed its wild condition to the defendants' servants in such a way as to deprive them of the benefit of the doctrine of the *prima facie* harmlessness of domestic animals as frequenters of the highway; and that the duty of controlling it as though it belonged to the class of animals *ferae naturae* had fallen on the defendants and their servants.

Held also by the Supreme Court, that the action of the owner of the yard in driving the bullocks out to save his goods was not a *novus actus interveniens* which broke the chain of causation and deprived the plaintiff of her remedy against the defendants.

Scott v. *Shepherd*, 2 Wm. Bl. 892, followed.

Decisions relating to the liability of the owners of animals *mansuetae naturae* doing damage on the highway considered.

TRIAL OF ACTION.

The action was brought for damages for personal injuries sustained by the plaintiff by the negligence of the defendants or their servants in the driving and care of a bullock on the public highway at Cork Hill, Dublin, on the 7th November, 1923. The bullock was the property of the defendants, a firm of cattle salesmen, and, with a number of other cattle, had been purchased in Roscrea, County Tipperary. These cattle had been put in two railway waggons and sent to Kingsbridge Station, the two waggons being attached to a passenger train. The defendants sent their foreman drover, John Nugent, to meet the train and take charge of the cattle. Nugent brought with him another drover named James Hannon. There is a cattle bank for the unloading of cattle at Kingsbridge Station, with strong wooden fences to prevent the escape of cattle when they are being unloaded. By reason of the two waggons being attached to a passenger train, the cattle were not unloaded at the cattle bank, but at the passenger platform, and at that place there are no cattle pens. The place where the cattle were unloaded is surrounded by a wall, and has a gate leading out to St. John's Road. When the cattle were being unloaded, two bullocks "got wild" on the platform, ran upon the adjoining plots, were turned back, and then escaped through the gate and ran past Kingsbridge Station down the quays. Nugent and Hannon drove the remainder of the cattle to the defendants' premises in Prussia Street. On the way, they met another drover named Hefferman, who was an acquaintance of Nugent's, and he went off in search of the two missing bullocks, Nugent having asked him to come back if he found them and tell him (Nugent), and that he (Nugent) would go to them with more cattle and bring them back quietly. Heffernan found the two bullocks in a yard in Bull Lane, left them there, and returned to Nugent, who then sent Hannon and Hefferman to bring back the two bullocks. But when these men got to Bull Lane the bullocks were not there. Another witness saw the two bullocks running up Bull Lane, which is a cul-de-sac, and at the head of which a man named Kelly, a dealer in metal goods, has a yard. Kelly stated that the two bullocks, one black and one red, came into his yard,

Johnston J. 1924.

HOWARD v. BERGIN, O'CONNOR, & Co.

where they did some damage, and he drove them out "to save his stuff from being smashed up." He followed the two bullocks, but they separated when they reached the quays. The black one went up Winetavern Street, and so reached Lord Edward Street. Kelly followed the other one, and, having found out to whom it belonged, brought it to the defendants' premises. The black bullock, coming up behind the plaintiff in Lord Edward Street, struck her shoulder and knocked her down into the roadway. It was in respect of the injuries so sustained that the action was brought. The further facts are stated in the judgments.

The questions which were left to the jury, with their answers, were as follows:—

1. Was the bullock which knocked down and injured the plaintiff the property of the defendants? Yes.

2. If so, was the said bullock at the time of the occurrence on the public street unattended by any servant of the defendants? It was not. (It was agreed by both parties that what the jury meant by this answer was that the bullock was not attended by any servant of the defendants.)

3. Did Nugent and Hannon take proper precautions at the unloading of the cattle at Kingsbridge to prevent them escaping on to the public street? No, inasmuch as the cattle should have been unloaded at the proper cattle unloading bank.

4. Were the defendants' men guilty of negligence in not following the escaped bullocks, and getting them under proper control? No. If we regard Heffernan as one of the defendants' men, we consider he was guilty of negligence in leaving the bullock at the yard.

5. What damages? £250.

Wm. J. Gleeson and *M. C. Maguire* for the plaintiff.

J. M. Fitzgerald K.C. and *T. F. Bacon* for the defendants.

Cur. adv. vult.

Nov. 24.

JOHNSTON J.:—

The plaintiff, a girl of sixteen years of age, was knocked down by the defendants' bullock in Lord Edward Street on November 7, 1923, between 1 and 2 o'clock p.m., sustaining very considerable personal injuries. The present action is based entirely on the alleged negligence of the defendants' servants in the management and control of the animal, which is not alleged by the plaintiff to have had any vicious or mischievous propensity. Further, there is no suggestion of scienter, personal or imputed, on the part of the defendants. The latter deny that there was any negligence on the part of their servants—or, at any rate, any negligence which directly contributed to the accident; and they rely on the rule of law which exempts the

owners of animals *mansuetae naturae*, as distinct from those *ferae naturae*, from liability for harmful acts committed by such animals.

The evidence adduced on behalf of the plaintiff was not of a very illuminative character. The plaintiff herself and a Miss Rosanna Whitty deposed to the actual occurrence, and neither of these ladies suggests that any person was in charge of the bullock when it knocked the plaintiff down. A man called O'Hara says that at about 1 o'clock two bullocks—a black one and a red one—ran into Bull Lane, which is off Chancery Street, and entered the yard of a man called Kelly, where they appear to have done some damage. It is stated that a few minutes afterwards a man who resembled a drover arrived and went away again. Kelly drove the two bullocks out of his yard and down Bull Lane. The bullocks separated when they got to the quays. Kelly followed the red one, which went towards Kingsbridge; and, having acquired some information on the way, he drove that animal to the defendants' yard in Prussia Street. On that state of facts Mr. Fitzgerald asked for a direction, on the ground that there was no evidence of negligence to go to the jury, and he cited *Cox* v. *Burbidge* (1).

I declined to direct, and the defendant went into evidence. It appeared that seventeen cattle had been purchased for the defendants in Roscrea on November 6. James O'Connor, who purchased them, stated that "he saw nothing flighty about any of them." They were sent to Kingsbridge by passenger train—eight in one waggon and nine in the other; and arrived on the morning of the 7th. They were unloaded at a place called the Military Siding at St. John's Road, which is the usual place for the unloading of cattle arriving by passenger train. This was done by John Nugent, the defendants' foreman, and a drover called Hannon, assisted by some railway porters. Cattle arriving by goods train are unloaded at the cattle bank, which is some considerable distance away, and has strong wooden fences for penning the animals in. There are no such pens or fences at the Military Siding. Nugent, on cross-examination, said: "I was entirely in charge of the unloading of the cattle, and not the railway company. If the waggons were not in a suitable place for unloading, it would be my duty to request the railway company to put them at a suitable place." He stated also that cattle are liable to take fright when they are being unloaded.

Two of the animals, when they were taken out of the waggon, dashed through the others; and, in spite of the efforts of the two drovers, got through the open gate of the station into St. John's Road, and ran off in the direction of the quays. Nugent and Hannon drove the other fifteen cattle to the defendants' yard. At Prussia Street Nugent met another drover called Heffernan, whom he knew as a casual acquaintance. Heffernan volunteered to go in search of the missing cattle. Nugent then gave the

(1) 13 C.B.N.S. 430.

Johnston J. 1924.

HOWARD v. BERGIN, O'CONNOR, & Co.

following evidence, to which no objection was taken: "I said to him to come back and tell me if he could find the cattle, so that I could go down with more cattle to bring them back quietly. Heffernan came back to me, and I sent James Hannon and Heffernan with a bunch of cattle to bring back the strayaways. When they got there the strays were gone."

On this state of facts, recognising that there were important questions of law involved in the case, I thought it right to take the view of the jury on all the questions of fact that might be said to arise. The jury found, in answer to the first question, that the bullock which knocked down the plaintiff was the property of the defendants. In answer to the second question: "If so, was the said bullock at the time of the occurrence on the public street unattended by any servant of the defendants?" the jury answered: "It was not"—an answer which, in view of the evidence and my charge, I took to mean that the bullock was not attended by any servant of the defendants; and counsel for both parties agree that that is what the jury meant. The third question was: "Did Nugent and Hannon take proper precautions at the unloading of the cattle at Kingsbridge to prevent them escaping on to the public street?" The jury answered: "No, inasmuch as the cattle should have been unloaded at the proper cattle unloading bank." That was a finding that they did take proper precautions at the actual unloading at the Military Siding, coupled with an expression of opinion that the unloading ought to have taken place at another place—namely, at the cattle bank, where cattle arriving by goods train are unloaded. In view of the evidence given by Nugent, that the Military Siding was the place provided by the railway company for the unloading of cattle arriving by passenger train, I do not think that the question to which this expression of opinion of the jury would have been an answer could or ought to have been put. The fourth question was: "Were the defendants' men guilty of negligence in not following the escaped bullocks and getting them under proper control?" The answer was: "No. If we regard Heffernan as one of the defendants' men, we consider he was guilty of negligence in leaving the bullock at the yard." There was no evidence that Heffernan was in the service of the defendants. If he was, he was not employed to do more than ascertain where the bullocks had strayed to, and report to Nugent. I must therefore take the fourth answer as a finding in favour of the defendants. No objection was taken by counsel for either side to the questions that I left to the jury (except the objection involved in Mr. Fitzgerald's request for a direction in favour of the defendants); nor was I asked by either side to leave any further or other question or questions. As a matter of precaution, I took the opinion of the jury on the question of damages, and they found in favour of £250, to which sum the plaintiff is entitled if she is to succeed.

Mr. Fitzgerald, in his argument on Friday last, stated that

the difference in the degree of liability for the harmful acts of animals *ferae naturae* and of animals *mansuetae naturae* was at least a hundred years old. As a matter of fact, it is as old as the Mosaic law (see Exodus xxi, 28, 29). The extent to which this doctrine was recognised amongst the Athenians and the Romans and in the Code Napoléon is summarised in a learned note to the report of *Card* v. *Case* (1). The doctrine was clearly recognised in the ancient Brehon Law of Ireland. In the law tract entitled "Judgments of Co-tenancy" (Ancient Laws of Ireland, vol. iv, p. 103) the penalties are detailed with great particularity that are to be incurred by the owners of "gorers and fierce cattle." The author then adds: "These are their judgments here, unless the calf had never been known before as a gorer; but if he had been known as such . . ." the penalty for the wrong-doing is repeated. The Book of Aicill (*ibid.*, vol. iii, p. 235) differentiates between the compensation payable in the case of a bull committing a first trespass and in other cases; and in the same tract (p. 337) a clear distinction is drawn between injuries done by "a small animal of first offence" or "an animal of first trespass" and "an habitually wicked animal," a phrase which is wide enough to include both animals *ferae naturae* and domesticated animals which had developed mischievous propensities. Further, it is stated (p. 181) that a person who brings a horse to a fair is exempt from injuries done by the animal "if he did not know its viciousness." Even in Scotland, where the Common Law had a different development from that in England and Ireland, it was held recently that this doctrine was equally part of the law in that country: *Fraser* v. *Vate* (2).

The modern development of the law is conveniently summarised in three propositions which I take from the judgments in *Manton* v. *Brocklebank* (3):

(*a*) "I am satisfied that by English law the mere possession of an animal of the class usually described as *mansuetae naturae* does not render the owner liable for injuries done by it to the person or to goods" (Warrington L.J., at p. 226).

(*b*) "It is true that the owner of an animal *ferae naturae* must keep him under control; and if he allows him to escape from control, he is liable for damage done by such animal" (Atkin L.J., at p. 230).

(*c*) "It is also true that the owner of a domesticated animal *mansuetae naturae* which has acquired to his knowledge some vicious or mischievous propensity is responsible to the same degree as though it were an animal *ferae naturae*, because, as Willes J. says, it forms an exception to its class: *Cox* v. *Burbidge*" (4). (Atkin L.J., at p. 230.)

There is no evidence that the bullock which caused the injury to the plaintiff had, previously to this occurrence, displayed any

(1) 5 C. B. 622.
(2) [1923] S. C. 748.
(3) [1923] 2 K. B. 212.
(4) 13 C.B.N.S. 430.

Johnston J. 1924.

HOWARD v. BERGIN, O'CONNOR, & CO.

vicious or mischievous propensity; and no effort was made by the plaintiff to substantiate such a case. On the contrary, the case sought to be made is the negligence of the defendants' servants, and that only. Such negligence, however, to sustain the plaintiff's claim, must (as Erle C.J. said in the historic case of *Cox* v. *Burbidge* (1)) be proved to be "connected with the damage of which the plaintiff complains"; or, as Lush J. said in *Turner* v. *Coates* (2), there must be negligence on the part of the defendant, and the damage must flow immediately from that negligence.

An examination of the principal cases in which plaintiffs have succeeded in recovering damages in respect of harmful acts done by animals not proved to be vicious, will, at this stage, not be without usefulness. As concrete examples of the application of this principle, they afford a practical standard of liability. Thus in *Jones* v. *Owen* (3) it appeared that the defendant took two greyhounds on to the highway, having first coupled them together. Thus impeded in their movements, the dogs dashed against the plaintiff and injured him; and it was held that, as the accident had occurred, partially, at any rate, through the act of the defendant in coupling the dogs together, he must be regarded as liable. Keating J. said: "The negligence alleged is not in allowing dogs to be on the highway without restraint, but in the fact that these greyhounds, coupled together, were there without being led or guided." *Turner* v. *Coates* (2) was the case of a young unbroken colt, which was being taken along a highway on a dark night. It was allowed to go loose behind a mare, which was being led, and in front of a trap driven by the defendant. The colt broke loose and injured the plaintiff, who was riding a bicycle which was lighted. Bailhache J. (p. 675) puts the matter thus: "The light did in fact frighten the colt, which turned round and, being headed back by the defendant" (who was in his trap), "rushed about on the road, and ran into and injured the plaintiff. Apart from authority, it seems to me to be impossible to hold that in these circumstances there was no negligence on the part of the defendant." In *North* v. *Smith* (4) the defendant's groom was held to have been negligent in applying a spur to his horse just as he was passing close to the plaintiff. In *Cunningham* v. *Whelan* (5) Molony C.J. held that there was evidence of negligence in the defendant allowing a "mass" of cattle to stray on the highway, obstructing it and causing the plaintiff's vehicle to be upset.

I am not aware of any case in which it was held that the mere act of a defendant in permitting, whether negligently or voluntarily, an animal belonging to him which had no vicious propensity of which he had any knowledge to wander on the

(1) 13 C.B.N.S. 430, at p. 436.
(2) [1917] 1 K. B. 670.
(3) 24 L. T. 587.
(4) 10 C.B.N.S. 572.
(5) 52 Ir. L. T. R. 67.

highway was negligence which rendered him liable for the acts of that animal; and if such a proposition were to be established, it would, in my opinion, wipe out entirely the reasonable and necessary distinction which every code of law recognises between the harmful acts of wild and of tame animals. The plaintiff here seeks in effect to establish as against the owner of the bullock the same degree of liability as was established in *May* v. *Burdett* (1) against the owner of the monkey. As Atkin L.J. pointed out in *Manton's Case* (2), it is the failure to keep effective control of an animal *ferae naturae* which is the essence of the liability; and since the time of *Cox* v. *Burbidge* (3), in 1863, the law reports contain dozens of decisions in which the harmful acts of wandering horses, cattle, sheep, swine, dogs, and poultry were held to have imposed no legal liability on their respective owners.

Of those cases, that of *Heath's Garage, Ltd.*, v. *Hodges* (4) is perhaps the most authoritative. It appeared that sheep had broken through holes in a fence, and, getting on to the highway, had upset the plaintiff's motor-car, without any negligence on the part of the driver of the car. The case was argued on the basis that the judgment of the County Court Judge in favour of the plaintiff must be treated as a finding that the defendant was negligent in not keeping his sheep from straying, and it was so treated (see the judgment of Pickford L.J., at p. 377); and yet the owner of the sheep was held not to be liable, as his negligence was not the direct and immediate cause of the occurrence. The well-known dictum of Blackburn J. in *Fletcher* v. *Rylands* (5) was cited with approval: "Our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore."

The only other English case to which I need refer is *Jones* v. *Lee* (6), which was the case of a horse escaping on to a highway through a defective hedge and injuring the plaintiff's bicycle. Bankes J. stated (at p. 126) that, assuming the animal to be a quiet, inoffensive one, and not known to the owner to be dangerous, the plaintiff, in order to succeed, must establish that the injury of which he complains was the result of some breach of duty towards him on the part of the owner of the animal.

The Common Law of Ireland recognises exactly the same principles of liability. Seventy-six years ago, in the almost forgotten case of *Kelly* v. *Wade* (7), it was alleged that the defendant so "badly, negligently, and carelessly managed and controlled" his fierce dog that through his mere default and negligence it did hurt and bite the plaintiff's sheep. This allegation, which bears a close resemblance to the statement of the cause of action in this case (except that here there is no

(1) 9 Q. B. 101.
(2) [1923] 2 K. B. 212.
(3) 13 C.B.N.S. 430.
(4) [1916] 2 K. B. 370.
(5) L. R. 1 Ex., at p. 280.
(6) 106 L. T. 123.
(7) 12 I. L. R. 424.

Johnston J 1924.

HOWARD v. BERGIN, O'CONNOR, & Co.

allegation that the bullock was fierce), was held by Pigot C.B. and Pennefather B. not to disclose any cause of action, as it did not allege any scienter on the part of the defendant, a dog not being an animal *ferae naturae*. Pennefather B. said (1): "A man is not bound to keep tied up an animal not *ferae naturae* unless he knows of its vicious disposition," a statement which is simply an anticipation of the principle re-enunciated by the Court of Appeal in *Heath's Garage, Ltd.*, v. *Hodges* (2).

Gayler & Pope, Limited, v. *Davies & Son* (3), on which the plaintiff relied so strongly, belongs to a different line of authority, and is not applicable to the present set of circumstances. In that case it appeared that the defendant, a milk vendor, had sent out his milk-van for the purpose of delivering milk. It was in the public street for the purpose of the defendant's trade. The man in charge left the pony unattended, and it bolted with the van, and ran into the plaintiff's shop-window. M'Cardie J. held that these facts established a case of *prima facie* negligence on the part of the owner. That case, however, is not an authority on the subject of liability for the acts of straying animals, and the long line of authority on that subject, beginning with *Cox* v. *Burbidge* (4), was not discussed or even referred to from that point of view. The report states (at p. 88) that the Judge came to the conclusion that the accident was due to the negligence of the defendants' servants in leaving unattended the pony, "which to their knowledge was of such a character as to require careful watching lest it should bolt."

Even assuming, therefore, that the answers to the third and fourth questions amount to a finding of negligence in favour of the plaintiff, I must rule that there is no evidence of negligence on the part of the defendant which is at all "connected with the damage of which the plaintiff complains": *Cox* v. *Burbidge* (4); and there must therefore be judgment for the defendant with costs.

H. H.

The plaintiff appealed to the Supreme Court (5) for an order that the judgment entered for the defendants be set aside, and in lieu thereof that judgment be entered for the plaintiff, or, in the alternative, that a new trial of the action be directed.

Wm. J. Gleeson and *M. C. Maguire*, for the appellant:—The owner of an animal *mansuetae naturae* straying through the negligence of the owner on to the highway and doing damage is liable for such damage, provided it is the natural and probable result of such straying. The respondents, in order to succeed,

(1) 12 I.L.R., at p. 427.
(2) [1916] 2 K. B. 370.
(3) [1924] 2 K. B. 75.
(4) 13 C.B.N.S. 430.
(5) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

must satisfy the Court that the damage occasioned to the appellant by the escaped bullock was not such as might have been expected under the circumstances: *Cox* v. *Burbidge* (1); *Hadwell* v. *Righton* (2); *Kelly* v. *Wade* (3); *Fraser* v. *Pate* (4); *Tillett* v. *Ward* (5); *Turner* v. *Coates* (6); *North* v. *Smith* (7); *Cunningham* v. *Whelan* (8); *Gayler & Pope, Ltd.*, v. *B. Davies & Son, Ltd.* (9). The chain of causation was not broken through the action of Kelly in driving the two bullocks out of his premises: *Scott* v. *Shepherd* (10).

J. M. Fitzgerald K.C. and *T. F. Bacon*, for the respondents:—There is no evidence to support the finding of the jury as regards the third question put to them. The unloading was not improperly done. Negligence, if any, only began when the bullocks escaped from control after leaving the railway station. The owner of an animal *mansuetae naturae* is not liable for damage caused unless such animal be trespassing on private property or unless there be the scienter of vice. An owner or occupier of land adjoining a public highway is not under a legal obligation to fence so as to prevent animals *mansuetae naturae* from straying upon the highway: *Heath's Garage, Ltd.*, v. *Hodges* (11). The accident was not the natural and probable result of the bullock's escape: *Manton* v. *Brocklebank* (12). Furthermore, Kelly's action in turning the bullock out of his yard was a *novus actus interveniens*. There is no evidence that Heffernan was the servant of the defendants. The plaintiff must prove agency. Heffernan had no authority from the defendants for acting as he did.

Wm. J. Gleeson, in reply:—There is no analogy between cases in which animals stray on to the highway in rural districts from their pastures, and those in which they are negligently allowed to escape from custody in a city or town and run unattended through the streets. Heffernan was appointed by Nugent, who acted within the scope of his authority.

KENNEDY C.J.:—

On the 7th November, 1923, between 1 and 2 o'clock in the day, the plaintiff, a girl then aged about fifteen and a half years, was walking along Lord Edward Street, on the footpath, in the direction of the city, when a bullock coming up behind her, struck against her left shoulder (that nearer the roadway), and knocked her down into the roadway. The collision occurred with such suddenness and violence that the plaintiff sustained very severe personal injuries involving a serious surgical

(1) 13 C.B.N.S. 430.
(2) [1907] 2 K. B. 345.
(3) 12 I. L. R. 424.
(4) [1923] S. C. 748.
(5) 10 Q. B. D. 17.
(6) [1917] 1 K. B. 670.
(7) 10 C.B. (N.S.) 572.
(8) 52 Ir. L. T. R. 67.
(9) [1924] 2 K. B. 75.
(10) 2 Wm. Bl. 892.
(11) [1916] 2 K. B. 370.
(12) [1923] 2 K. B. 212.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & CO.

Kennedy C.J.

operation and treatment, which has been successful, though there remain some minor consequences which may be permanent. The bullock was the property of the defendants, who are cattle-salesmasters. The action was brought to recover damages for the plaintiff's injuries alleged to have been suffered by reason of the negligence of the defendants or their servants in the driving and care of the bullock on the public highway. The surprise of the whole thing and her sufferings were sufficient to deprive the infant plaintiff of an opportunity to take in the surrounding circumstances, while the only eye-witness who gave evidence at the trial was a woman who was a short distance away and was also struck by the bullock. The plaintiff's advisers, when preparing her statement of claim, had not the whole facts before them, and, not unnaturally, assumed that the bullock was in charge of a drover at the time and place of the occurrence, and, in their particulars, attributed the alleged negligence to the imaginary drover. The facts, however, which were proved at the trial were as follows:—

The defendants bought seventeen head of cattle in Roscrea. They were taken in charge by a Mr. O'Connor on behalf of the defendant firm. He had them driven through the town of Roscrea to the railway, where they were loaded in two railway waggons and despatched to Kingsbridge. Eight of the animals were put in one waggon and nine in the other. Three men took part in the bringing of the cattle to Roscrea station and the loading of them into the train. Mr. O'Connor stated in his evidence that there was no difficulty in loading the cattle and that "he saw nothing flighty in them." He said he would like to have three men at the unloading of them. The two waggons were attached to a passenger train which arrived at Kingsbridge station at 11.30 in the forenoon of the day of the happenings we are considering. The defendants sent their foreman drover, John Nugent, to meet the train and receive the cattle. Nugent, who gave evidence on behalf of the defendants, was the most important witness at the trial. He had been the defendant's foreman drover for a number of years, and accustomed to dealing with cattle. Nugent brought with him one drover only, a man named James Hannon. I will now read Nugent's evidence as to what occurred at Kingsbridge:—"When we got to Kingsbridge at about 11.30 a.m. we went to the passenger platforms. The two waggons were drawn up. A train was shunting out with the waggons. We got two waggons of cattle at the departure platform. We got eight cattle out of one waggon. They came quietly. When the nine cattle were let out, the black and the red bullocks got wild on the platform. They ran up on the plots. James Hannon and a porter turned them back. I was standing at the gate. They burst out and ran past Kingsbridge down the quays. The other cattle turned up Kilmainham Road. I got before them, and I and James Hannon drove the fifteen cattle

down the quays. We had no sign of the two cattle. We drove the fifteen down the quays and across Watling Street Bridge and on to Prussia Street. I met a drover called Heffernan in Prussia Street. He was a casual acquaintance. He went off in search of the two cattle, and I said to him to come back and tell me if he could find the cattle, so that I could go down with more cattle to bring them back quietly. Heffernan came back to me, and I sent James Hannon and Heffernan with a bunch of cattle to bring back the strayaways. When they got there the strays were gone. I saw the red beast when it was brought back to the yard. I never saw the black one again." It appeared, and is not questioned, that this black bullock was the animal which caused the plaintiff's injuries. Its age was not stated. It was said to be without horns. On cross-examination Nugent said:—

"I am foreman drover of the defendant firm. I was in control of the unloading of the cattle. These cattle waggons were attached to a passenger train. There is a cattle bank for the unloading of the cattle at Kingsbridge. There are strong wooden fences to prevent the escape of cattle when they are being unloaded. We have to take precautions when unloading. They are liable to take fright when they are being unloaded. I was entirely in charge of the unloading of the cattle, and not the Railway Company. If the waggons were not in a suitable place for unloading, it would be my duty to request the Railway Company to put them at a suitable place. This was on Wednesday. The cattle market is on Thursday. These were intended for the market on the following day. I was anxious to get them up as soon as I could and give them a good rest before the market. At this place there were no pens at all. They were unloaded on to the passenger platform—the departure platform. This platform was not under the roof, but was further out. It was on St. John's Road or Military Siding. There is a gate near the platform leading out on to St. John's Road. It was through this gate that the two bullocks escaped. I was standing at the gate. It is a gate that can be closed. It moves on wheels and can be closed very easily. I did not close the gate. I used the stick to stop them. I and James Hannon were there. There are vegetable plots near the Siding. There was cabbage in the plots. Re-examined:—When these animals get out of the trucks they are frightened? I never had a case like this before. The cattle bank is a mile away. It is the usual practice when cattle are brought in on passenger trains to unload them at St. John's Road. There is a wall round the place and a gate. I did not close the gate."

Hannon, the drover, also gave evidence for the defendants. He said that the two bullocks, after he had driven them back from the plots, "went straight through the other cattle. No two men could have stopped them. I've seen cattle fidgety and restless, and I never saw cattle as restless as these before."

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

Kennedy C.J.

He stated that cattle on passenger trains would not be put off at the cattle bank. He expressed the opinion that "it would take a bigger man than Nugent to close the gates." He said: "There was no place to close up the fifteen to go after the two." O'Connor, Nugent, and Hannon were the only witnesses examined for the defendants. Two witnesses were, however, examined for the plaintiff, whose evidence showed the movements of the bullocks after they bolted from the Kingsbridge railway station. A man named O'Hara, who carries on a grocery business in Chancery Street, saw them running up Bull Lane—which is a cul-de-sac—at the head of which a man named Kelly, who deals in metal goods and general stores, has a yard. A few minutes later O'Hara saw a drover come to the place. The drover, who appears to have been James Heffernan, referred to by Nugent, said he would go and get other cattle to keep them quiet. A few minutes after he had left, the two animals rushed back down the lane towards the quays. The drover returned with four or five head of cattle in about twenty minutes. Kelly related that the two bullocks, one black and one red, came into his yard where they did some damage, for which he has been compensated. He drove them out of his yard "to save his stuff from being smashed up." He followed them. They separated when they reached the quays. The black one went up Winetavern Street, and so reached Lord Edward Street. Kelly followed the red one, and, having discovered where it had escaped from and to whom it belonged, brought it to the defendants. He did not recollect seeing any drover.

The action was tried by Johnston J. with a common jury. At the close of the plaintiff's case and again at the close of the defendants' evidence, the defendants' counsel asked for a direction on the ground that there was no evidence of negligence to go to the jury. The Judge put to the jury and took their findings on five questions, and allowed the case to stand for argument. The questions and findings were as follows:—

"1. Was the bullock which knocked down and injured the plaintiff the property of the defendants? Answer: Yes.

"2. If so, was the said bullock at the time of the occurrence on the public street unattended by any servant of the defendants? Answer: It was not."

Note.—It was admitted and agreed by both parties here that this answer should read "it was," the jury having mistaken the word "unattended" for the word "attended."

"3. Did Nugent and Hannon take proper precautions at the unloading of the cattle at Kingsbridge to prevent them escaping on to the public street? Answer: No, inasmuch as the cattle should have been unloaded at the proper cattle unloading bank.

"4. Were the defendants' men guilty of negligence in not following the escaped bullocks and getting them under proper

control? Answer: No. If we regard Heffernan as one of the defendants' men we consider he was guilty of negligence in leaving the bullock at the yard.

"5. What damages? Answer: £250."

The case was subsequently argued on these questions and findings, whereupon the Judge gave judgment for the defendants with costs. He has stated his reasons in a written judgment. The plaintiff now moves by way of appeal to have that judgment set aside and to have judgment entered for her for £250, or, in the alternative, for a new trial.

Johnston J. in a learned judgment, in which he reviewed the authorities, held that the bullock was an animal *mansuetae naturae*, and was not proved to have had a vicious propensity to the knowledge of the defendants, or at all, and, therefore, that the defendants were not liable for an injury caused by it while wandering on the highway. He said as to the third question that the finding of the jury was a finding that the defendants did take proper precautions at the actual unloading coupled with an expression of opinion that the unloading ought to have taken place at another place, but that this latter matter could not have been left as a question on the evidence.

As to the answer to the fourth question, he said that there was no evidence that Heffernan was in the service of the defendants, certainly not employed to do more than ascertain where the bullocks had strayed to and report to Nugent. He took the fourth answer as a finding for the defendants.

The facts in the case are simple, and, apart from the question of negligence, are not in dispute. The whole evidence as to what occurred at the Kingsbridge railway station was given by the defendants and accepted by the plaintiff. It is, therefore, common case that the black bullock which caused the injuries to the plaintiff, on being unloaded "got wild on the platform," ran up on the adjoining plots, was driven back by the defendants' drover with the help of a railway porter, and then rushed out from the railway premises on to the public road, through an open gate by which the defendants' foreman drover was standing. No servant of the defendants pursued the animal to recapture it. It continued its course through the streets of the city, until it struck the plaintiff. It did not attack the plaintiff. It did not attempt to gore or toss her. (The evidence is that it was without horns.) In its wild flight it collided with the little girl as it also collided with the witness, Rosanna Whitty.

The case on the evidence differs from the case on the pleadings, which, I think, should have been amended at the trial. Having regard to the evidence given by the defendants, and to the course of the trial and the arguments before the trial Judge, and to the argument in this Court, we must, in my opinion, take it to be admitted and assume (as counsel on both sides have assumed in argument) as if the jury had formally so found,

Supreme Court.
1925.
HOWARD v. BERGIN, O'CONNOR, & Co.
Kennedy C.J.

that the bullock which injured the plaintiff, as soon as it was released from the railway waggon, got wild on the platform, and in that wild state rushed out of the railway premises on to the public streets, and that the defendants' servants, Nugent and Hannon, were fully aware of its condition of wildness from the moment it came out of the waggon.

We have the further admission of Nugent, speaking from his experience, that it is necessary "to take precautions when unloading. They are liable to take fright when they are being unloaded."

It could not be, and was not suggested that the bullock was at any time after its escape from the railway station in the character of an animal being lawfully driven along a public highway or street, and, in my opinion, decisions relating to that state of facts have no direct application to the admitted facts of the present case.

The main line of argument presented with great force by Mr. Fitzgerald for the defendants was that by the common law there is no duty on an owner of cattle, being of the class of animals *mansuetae naturae,* to fence or otherwise keep them off the highway, and that if they stray and do damage he is not liable unless he had knowledge of a mischievous propensity in the animals, against which alone he should take precautions. Mr. Fitzgerald relied very strongly on *Heath's Garage, Ltd.*, v. *Hodges* (1). The argument assumes the absence of a mischievous propensity from the black bullock, or, alternatively, that such propensity (if any) was not proved to be known to the defendants. This argument of course proceeds on the assumption that the wild state of the bullock before its escape was not a "mischievous propensity," an assumption which also underlies the judgment of Johnston J.

It appears to me that the argument and the judgment proceed upon the further assumption that the "mischievous propensity" mentioned in the reported cases means something of a chronic character, though it may be only intermittently active, in the nature of a particular animal. In my opinion, however, what is called a "mischievous propensity" may be as well a passing or temporary phase of the character or temper of the particular animal as a chronic or permanent element of its nature. If this opinion needs any authority to support it, reference may be made to, *inter alia, Turner* v. *Coates* (2); *Manton* v. *Brocklebank* (3).

Moreover, the expression "a mischievous propensity" is not, in my opinion, to be limited to mean only what may be termed a "specialised propensity," as for instance in the case of a particular horse, generally mild, but with a special propensity in certain circumstances to kick, or, in the case of a bull which has acquired what in view of the famous *dictum* of Blackburn J.

(1) [1916] 2 K.B. 370. (2) [1917] 1 K.B., per Lush J., at p. 674.
(3) [1923] 2 K.B., per Warrington L.J., at p. 227.

must be described as an idiosyncrasy which impels him to gore. I understand by the expression "a mischievous propensity," a propensity to do mischief, a tendency to do harm or cause injury, whether, in one case, by some single characteristic action such as kicking or goring or biting or, in another case, generally, when mischief may be done in any of a variety of ways. As an example of the latter, or general propensity to mischief, take the case of an ox, ordinarily mild, brought to slaughter. It is said that the animals show an instinctive revulsion from the smell of the slaughter-house and often become wild. In my opinion if a beast, having become maddened in such circumstances, were allowed by the butcher to escape and run amuck in a crowded street, the butcher must be held to know that the beast was abroad with a mischievous propensity—that is to say, with a general propensity to mischief, though acquired only in the very surroundings from which it had escaped. I think that this view is an element of the *ratio decidendi* in such cases as *Turner* v. *Coates* (1). The judgment of Atkin L.J. in *Manton* v. *Brocklebank* (2) is to be considered in this connection. Mr. Fitzgerald's argument must logically result in a denial of any responsibility in law on the part of the butcher in the case I have put. I am satisfied that no such immunity is given by the law.

Now, in the case under appeal, the black bullock on emerging from the railway waggon displayed its wild condition to the defendants' servants in such a way as, in my opinion, to deprive them of the benefit of the doctrine of "the *primâ facie* harmlessness of domestic animals as frequenters of the highway" (so put by Neville J. in *Heath's Garage, Ltd.*, v. *Hodges* (3)). The animal had to the knowledge of Nugent and Hannon become "an exception to its class" (the phrase is that of Willes J. in *Cox* v. *Burbidge* (4)), and the duty of controlling it as though it belonged to the class of animals *ferae naturae* had fallen on the defendants and their servants: *Cox* v. *Burbidge* (5); *Manton* v. *Brocklebank* (6); *Turner* v. *Coates* (7). The bullock had acquired a propensity to mischief, and it "did exactly the damage which the owner must have anticipated it would do if the circumstances arose, which in fact arose in this case" (see per Bailhache J. in *Turner* v. *Coates* (8)), that is to say, it dashed blindly along colliding with or overturning human impediments to its wild progress.

Apart from the defendants' knowledge of the mischievous propensity actually acquired by the animal before the escape, which, in my opinion, takes them out of the defined immunity given to owners of domestic animals, it is to be added that

(1) [1917] 1 K. B. 670.
(2) [1923] 2 K.B. 212.
(3) [1916] 2 K.B. 370, at p. 382.
(4) 13 C.B. (N.S.) 430, at p. 440.
(5) 13 C.B. (N.S.) 430, per Willes J.
(6) [1923] 2 K. B. 212, per Atkin L.J., at p 231.
(7) [1917] 1 K.B. 670, per Lush J., at p. 674.
(8) [1917] 1 K. B., at p. 675.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

Kennedy C.J.

they had prior knowledge on their own admission of the tendency of cattle when being unloaded from the railway to get frightened and to become wild and restless.

I will now consider the case in the view that the claim has been based on negligence only. The third question put to the jury and the answer to that question have been interpreted by Johnston J. as a finding that the defendants did take proper precautions at the actual unloading at the Military Siding coupled with an expression of opinion that the unloading ought to have taken place at another place, namely, the cattle bank. I regret to say that I am at a complete loss to understand how the learned Judge arrives at this interpretation of the finding. It appears to me that the jury have found in the plainest terms that, inasmuch as the cattle were unloaded at the passenger platform and not at the cattle unloading bank, the precautions taken or arrangements made for the unloading (which might have been sufficient and proper at the cattle bank) were not sufficient or proper precautions at the actual place of unloading, and, accordingly, the answer to this question is, in my opinion, a finding of negligence against the defendants.

Such a finding of negligence is amply supported by the evidence. At the cattle bank there are pens for "bunching" the cattle as they come out of the waggons, which enables control to be established over the animals before they are driven out on the public road. There are no such pens at the Military Siding where the defendants knew the animals would be discharged, and, in fact, caused them to be discharged by sending them by passenger train. The defendants' witnesses said that cattle are liable to take fright when being unloaded. Only two men were sent to take the cattle from the train. The defendants' witness, O'Connor, said in his direct examination that he "would like to have three men at the unloading of them." Hannon said in his direct examination that "no two men could have stopped them." Further, we have it proved by the defendants that, opposite to the waggons as they were unloaded, there is a gate leading on to the public road, and that this gate was open; that Nugent stood by it; that it is a gate which moved on wheels, and can be closed very easily, but that Nugent did not close it, and the bullock escaped through it. There is, therefore, evidence to support a finding of negligence both at the earlier stage, namely, at and prior to the actual unloading, and at the later stage, namely, when the bullocks had become wild.

With regard to the fourth question, in answer to which the jury found that Heffernan was guilty of negligence, but negligence which cannot be brought home to the defendants for want of a finding that Heffernan was a servant of the defendants, I must respectfully disagree with the learned Judge who did not put that question to the jury on the ground that "there was no evidence that Heffernan was in the service of the

defendants." Nugent was, on his own evidence, in complete charge of the business of transferring the cattle from the railway to the defendants' premises, and he was their regular foreman drover. In my opinion it was open to the jury to find on the evidence that Nugent had authority to obtain further assistance in such circumstances as arose here, and that he did within such authority enlist the services of Heffernan for the recapture of the bullocks. In my view of the third finding, however, the plaintiff will not suffer by the gap which defeats the fourth finding.

The suggestion that the action of Kelly, who, when he found the two bullocks smashing up his goods, drove them out of his yard, was a *novus actus interveniens* which broke the chain of causation and cut the plaintiff off from remedy against the defendants could not be seriously pressed. It is too clearly ruled by the principle of *Scott* v. *Shepherd* (1). Actually, in that famous case, the analogy is made in one of the judgments with the case of a mad ox turned loose in a crowd, and in another of the judgments with the case of the diverting of the course of an enraged ox.

I am of opinion, therefore, that this appeal must be allowed with costs, and the judgment entered by Johnston J. for the defendants must be set aside, and that in lieu thereof judgment should be given for the plaintiff for £250 damages on the findings of the jury, with costs of action.

O'CONNOR J.:—

This action was brought to recover damages for injuries occasioned to the plaintiff when walking on the footpath in Lord Edward Street, Dublin, by being knocked down by a bullock which belonged to the defendants, and which at the time of the occurrence was at large and unattended. Two defences were raised:—That there was no negligence; that even if there were negligence, it gave no cause of action under the circumstances.

The case is an important one for the public and of interest for lawyers.

The material facts are these:—The defendants are cattle salesmen who carry on business in Prussia Street, Dublin, where they keep cattle-yards. They bought in Roscrea, in County Tipperary, seventeen head of cattle, and caused them to be entrained there for delivery at Kingsbridge, Dublin. At Kingsbridge there is a special place for unloading cattle with special arrangements for the purpose. One of these is the provision of strong wooden fences constructed so as to prevent the escape of cattle when being unloaded. The purpose is obvious, and, indeed, was admitted. Cattle on being unloaded after being pent up in trucks during a railway journey are inclined to break

(1) 2 Wm. Bl. 892.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

O'Connor J.

loose and get scattered, and it is all-important to keep the entire consignment bunched together as they are being driven from the unloading place. If they are let loose immediately on detrainment the leaders may be well ahead of those in the rear, and it would be impossible for the drovers usually employed to guide and control the lot. Further, if cattle are kept well together they go more quietly and are more easily driven and managed.

According to the evidence given at the trial all cattle trains—that is, trains which contain cattle only—are brought to the landing place I have mentioned, and there unloaded. But cattle are sometimes carried in trucks which are attached to passenger trains, and these trains are brought to the ordinary passenger platforms. Such trains are, as I understand, so composed that the cattle trucks are at the end of the train. When the train is brought to a stop, while the passenger carriages and usual luggage vans are actually brought into the covered terminus, the cattle trucks behind are left outside, just at the end of the platform, where there is an extended place where live stock may land.

The cattle in question were transported to Kingsbridge in trucks attached to a passenger train. These trucks when the train stopped were opposite to the enlarged space I have mentioned. This space is enclosed by a wall with a gate capable of being closed. The evidence is that this place is frequently used for unloading cattle which come by passenger trains. There are there no fences such as are provided at the usual place for unloading cattle, but the enclosing wall and gateway, if closed, serves the purpose, because the cattle could be "bunched" before being driven out.

The defendants' cattle were in two trucks, and on arrival were taken in charge by John Nugent, the defendants' foreman drover. His evidence is all-important, and I think that the whole case turns upon it. He said: "There is a cattle bank for the unloading of cattle at Kingsbridge (he is here speaking of the place for unloading cattle trains). There are strong wooden fences to prevent the escape of cattle when they are being unloaded. *We have to take precautions when unloading.* They are liable to take fright when they are being unloaded." In this part of his evidence he shows the necessity for the pens. He then goes on to say: "I was entirely in charge of the unloading of the cattle—not the Railway Company. If the waggons were not in a suitable place for unloading it would be my duty to request the Railway Company to put them at a suitable place." Then, as I understand his evidence, he gave an explanation why he did not require the waggons to be drawn to the proper landing place. He said: "This was on a Wednesday. The cattle market is on Thursday. These were intended for the market on the following day. I was anxious to get them up as soon as I could and give

them a good rest before the market. At this place there were no pens at all." In other words, he made no objection to the place where there were no pens, the advantage of which he recognised, because he could get his cattle home sooner. Now, let us see whether, having dispensed with the pens, he took precautions, which he said were necessary, because cattle take fright during unloading. There were no pens, but there was at the actual unloading place what served the purposes of a pen. There was a wall enclosing the place with a gate in it capable of being closed, and which, he said, "can be closed very easily." If that gate were closed no cattle could have escaped. What happened? The two trucks were unloaded. Two of the cattle were excited, and dashed wildly about. The foreman drover stood at the gate to guard it, but the two cattle dashed through and escaped. Now, by standing at the gate he showed that he thought it required to be guarded. The observation is open that the obviously effective way of guarding it was to close it, and that it would not be an unreasonable opinion to form that the foreman drover did not take proper precautions having regard to his own evidence about the likelihood of cattle taking fright on being unloaded and the necessity for pens.

The two cattle escaped into the City. The foreman drover and an assistant named Hannon remained with the remaining fifteen, as, indeed, I think they were obliged to do, because they could not abandon fifteen on the chance of reclaiming two. These two men drove the fifteen cattle down the quays, and no doubt they hoped to overtake the two which had escaped. They did not do so, and, meeting a drover named Heffernan who was known to Nugent, the latter asked him to search for them, and when he had found them to come back to him in order that he might go to them with more cattle and bring them back quietly. Heffernan went off and found the missing cattle in a yard in Bull Lane. Having located them there, he left them and returned to give the information to Nugent. Meantime the owner of the yard found the cattle on his premises doing damage to his property, and turned them out on the public street. Left there, they again proceeded to wander, one of them found its way to Lord Edward Street, and there knocked down the plaintiff on the footpath, inflicting on her serious injuries. It is very unlikely that there was any vicious attack by the animal. It is much more probable that it was running in a state of fright—the state which one would expect any animal to be in, which was taken from green fields and found itself in the unaccustomed surroundings of a city thoroughfare.

Putting aside for a moment the question of negligence, I will address myself to one of the points made by the defendants' counsel, viz.:— That the damage done to the plaintiff was not the natural and probable consequence of the escape.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

O'Connor J.

It is, no doubt, true that the defendants' or their agent could not possibly have foreseen the special accident which is complained of; but it is equally true that anyone allowing a bullock absolutely fresh from the country to wander at large in a crowded city thoroughfare ought to know that anything might happen—the knocking down of an old man, the overturning of a perambulator, a dash into a china shop, or any other mishap impossible to specify. In the present case the mishap was the collision of the beast with the plaintiff. That belonged to the class of things anyone would have apprehended from the escape. But then it was urged that the mishap to the plaintiff was not caused by the escape from the railway premises—that that originating cause had spent itself when the offending animal found an asylum in Kelly's yard—that, there, the chain of causation had stopped—and that he, a *novus interveniens,* by driving out the two cattle started them on an entirely new career of dangerous activity. It appears to me, however, that his action was in law identical with that of the intervening squib-thrower in *Scott* v. *Shepherd* (1). As the result of the original escape the cattle found their way to Kelly's private yard where they were playing havoc with his goods, and he drove them out—just as the intervening squib-thrower got rid of the squib. Indeed, in the adventures of a wandering beast there is always the likelihood of an *interveniens.* A bullock is seen rushing down a street and a man with a stick may stop him. It may then divert to another course, from which he may be driven by the shouts of boys, and so on. These interferences are only the natural incidents proceeding from the original escape. They may mark twists and turns, but they do not mark breaks in the chain of causation.

I hold, then, that the final event in the bullock's career, that is, the knocking down of the plaintiff, was the natural consequence of the escape—that that consequence was not too remote, and gave a cause of action if the escape was the result of the defendants' negligence, and if negligence threw legal responsibility on the defendant. I have already indicated that there was evidence of negligence on which the jury might find a verdict for the plaintiff. The learned Judge put the question: "Did Nugent and Hannon take proper precautions at the unloading of the cattle at Kingsbridge to prevent them escaping on to the public street?" The answer was: "No, inasmuch as the cattle should have been unloaded at the proper unloading bank." I read that answer as meaning that there was negligence in allowing the cattle to be unloaded at an unsafe place, or in unloading them at an improper place without taking proper precautions against the attendant risks. The learned Judge interpreted the answer as meaning that the defendants did take proper precautions at the actual unloading, coupled

(1) 2 Wm. Bl. 892.

with an expression of opinion that the unloading ought to have taken place at another place. With the utmost respect, I beg to say that this is an impossible interpretation, directly opposed to the language used. I am clearly of opinion that the jury intended to find, and did find, negligence, and that the language of the answer is explained by the evidence of Nugent that he was in entire charge, that, in effect, he accepted the landing place for the special reason that he alleged, and that pens were a most desirable precaution against escape, and in the absence of pens he did not provide against an escape by closing a gate which he admitted he might easily have closed.

But the defence did not stop there. Mr. Fitzgerald, counsel for the defendants, with his usual ability, took up two other lines of defence. Firstly, he maintained that the owner of an animal *mansuetae naturae*, unless it be trespassing on private property or unless there be the *scienter* of vice, is not liable for damage done by such an animal. No doubt this, as a general proposition, is true, but it must be subject to qualifications; if it is not, it is impossible to understand well-recognised cases of authority. A horse is *mansuetae naturae*, and yet if a horse, no matter how well trained and docile, is left unattended in a public street, and if, owing to some special circumstances, he runs away and does damage the owner is liable. If a well-trained and docile horse, accustomed to the traffic of a public street, may occasion actionable damage if unattended and left without control, why should not a bullock, left without any control in a public street and subjected to disturbing surroundings to which it is wholly unaccustomed and which are most likely to produce fright, entail similar consequences? True, the bullock may have no vice, but because he is a bullock he is subject to fright under what are, to it, abnormal circumstances. The rustic coming to town for the first time is more likely to be run over than the townsman. The bullock taken from the serene quietude of his native fields and subjected to the din and noise of a city is more likely to run down the townsman. I do not think that the general proposition on which Mr. Fitzgerald relied covers a case like the present. But, if necessary, I would hold that there was a *scienter* in this case. Nugent said that cattle unloaded from a train are liable to take fright. Fright may not be a vice, properly so called, but it produces a condition which, in a public thoroughfare, is very dangerous, and the owner of the frightened animal is bound to take the necessary precautions. I have searched for authority against this proposition and I could find none. I think that it is consistent with all the authorities which were cited during the argument.

The leading case of *Cox* v. *Burbidge* (1) was strongly relied upon by the defendants, but the judgment turned entirely upon the improbability of the horse in that case kicking the plaintiff,

(1) 13 C.B.N.S. 430.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

O'Connor J.

an event altogether contrary to the habits of the horse. Erle C.J. said (1): "It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it . . . The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind the owner is, of course, responsible. But, if a horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has." The same law applies to a bullock; but does it mean any more than this: that in usual circumstances a horse and a bullock may be expected to remain harmless when straying on a highway? It does not mean that a bullock normally harmless ought to be expected to continue so, if put out on the highway in a state of excitement caused by fright. Nugent, the drover, said that precautions had to be taken. Why? Because beasts were liable to take fright during unloading. Here is the evidence of the *scienter*—not, perhaps, of a vicious disposition, but of a disturbed condition equally fruitful of harm, which requires precaution. In *Cox* v. *Burbidge* (2) the surroundings were rural, apparently those which the horse was accustomed to. How different were they from the circumstances of the present case!

In *Heath's Garage, Ltd.*, v. *Hodges* (3) the liability of an owner of animals allowed by him to stray on a public highway was fully considered. It was held that he was not liable because the animals were harmless domestic animals not known to have any dangerous propensity. The offending animal in that case was the most harmless of all domestic animals, a sheep, and the least likely to injure anyone. The idea underlying all the judgments is expressed by Lord Cozens-Hardy, who said (p. 376):—"I am prepared to hold that in ordinary circumstances, in an ordinary highway"—which was a rural highway—"it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance to the highway." The present case is not one of an escape in ordinary circumstances in an ordinary highway. We have the special elements of apprehension on the part of the drover which dictated precaution against the very event which happened. I should also observe that the negligence referred to by Lord Cozens-Hardy was only negligence in not having proper fencing, not negligence in not

(1) 13 C.B.N.S. 430, at p. 436. (2) 13 C.B.N.S. 430.
(3) [1916] 2 K.B. 370.

taking precautions against the escape of an animal in an excitable, and therefore dangerous, condition.

Now I come to Mr. Fitzgerald's last line of defence, maintained with equal ability and courage. His argument was, as I understand it, that by the common law of England—which is also the common law of Ireland—the occupier of a close adjoining a public highway is not under a legal obligation to maintain fences to prevent his animals *mansuetae naturae* from straying on the public highway, and that he is not liable for any accident which is occasioned by such straying under any circumstances. I interjected, during the course of the argument, that if that proposition were to be accepted the possibilities were appalling. It involves this—that a cattle salesman, having stock yards abutting upon a public street, is under no obligation to confine his stock, and may with impunity, so far as damage to individuals is concerned, allow twenty, fifty, or even a hundred head of cattle to stray on the public streets. Or, to take the very case with which we are dealing, if Nugent and his assistant in sheer negligence allowed the whole consignment of seventeen cattle to escape into the public street and if they did damage all round, the defendants would incur no liability to the injured parties. Such consequences must put us on enquiry, because our respect for the common law must make us unwilling to admit that it involves extravagant conclusions.

In my opinion the broad proposition cannot be maintained. In the first place, the cases I have already cited establish that animals *mansuetae naturae* known to have a dangerous propensity may not be allowed by the owner to stray with impunity. In the second place, I am inclined to the opinion (although, as I will show later on, it is unnecessary to decide the question in the present case), that the common law, which relieves the owners and occupiers of land adjoining highways from fencing their lands, does not apply to cities. I have not been able to find any authority to this effect, but I was urged to the conclusion I am inclined to adopt when seeking for an explanation of the common law. Its origin is involved in obscurity, but I think it arose in this way:—When roads were first made they ran through unenclosed country. The imposition of an obligation on the owners of the lands on either side to raise fences would have been intolerable Indeed, I think it never occurred to anyone to impose such a liability, because there was no necessity for fences. The traffic was so meagre and so slow that the obstruction of cattle was not of any importance whatever. These are the days of motor cars, but in the time of Charles the Second the stage-coach took two days to do the journey from London to Oxford. That, and pack horses, were almost the only traffic on the road. There may have been another reason against the obligation of fencing. The adjoining owners were accredited with the

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & CO.

O'Connor J.

ownership of the soil of the road *ad medium filum viae,* and should not, therefore, be shut out from it; and it also occurs to me that the common law right of diversion for a traveller into the adjoining land, when a portion of the roadway became impassable, was inconsistent with the existence of fences. In modern times the country became enclosed. Owners of lands put up road fences, not for the convenience of travellers, but for their own, and the erection of such fences could impose no liability upon them. But these explanations of the common law have no application to cities. For instance, the ownership *ad medium filum viae* is unknown in cities. For these reasons I am inclined to think that the common law proposition has no application to the conduct of business in cities, and I feel almost driven to this view by a consideration of the consequences which would ensue from non-liability for escape of animals from enclosures abutting upon public streets. It is, further, very remarkable that all the cases which have been cited were concerned with escapes from enclosures in rural districts. But, as I said, it is not necessary to decide that the common law, which was relied upon, does not apply to cities. We are dealing here with premises of an exceptional character—the terminus of a large railway which is an emporium for the consignment of cattle of all kinds, most of which may be quite docile, but others very excitable and unmanageable after the severe strain of a railway journey. To say that such animals may be let loose indiscriminately on crowded highways would, I think, be against the reason and spirit of the common law, which represents what was the common custom of the realm in days gone by.

For these reasons I am of opinion that the plaintiff is entitled to judgment on the finding by the jury, as I read it, that the defendants were guilty of negligence.

FITZGIBBON J.:—

In my opinion there should be a new trial of this action, for, while I am in entire agreement with the view that the judgment which has been entered for the defendants cannot be allowed to stand, I am unable to concur in a decision that the findings of the jury enable us to record a verdict and enter judgment for the plaintiff. I can honestly say that I am very glad that the majority of the Court has been able to arrive at a decision which will end the case in the plaintiff's favour, as I do not think that it is to the credit of the law that a case which has been tried out, and in which the jury have come to an agreement upon every question submitted to them, including the assessment of damages, should have to be tried over again by a new jury because the first jury, through no fault of their own, have failed to furnish the materials which are necessary, in my opinion, to enable the

Court to enter a judgment for one side or the other; but I think that to do so upon the findings as they stand involves the usurpation by the Court of the functions which belong exclusively to a jury.

I agree with the opinion expressed by Mr. Justice Johnston that there was no evidence upon which the jury were entitled to find that the defendants were guilty of negligence in unloading the cattle elsewhere than "at the proper cattle unloading bank." The waggons in which the defendants' cattle had been carried to Kingsbridge were attached to a passenger train, the Railway Company, in accordance with what is alleged to have been the usual practice in dealing with such waggons, shunting them, with the train to which they were attached, to what is known as the St. John's Road or Military Siding. The evidence is that: "It is the usual practice when cattle are brought in on passenger trains to unload them at St. John's Road." "Cattle on passenger trains usually unload there," and Hannon says on cross-examination: "Any cattle on passenger trains will not be put off at the cattle bank." It was not by direction of the defendants that the cattle were brought to the Military Siding: the most that could be said is that Nugent might have had them sent elsewhere if it had occurred to him that the Siding was an unsuitable place for unloading. According to Nugent, the regular cattle bank is a mile away from the Military Siding, and as the number of cattle concerned was not great, I cannot hold that to allow two waggons of cattle to be brought to the "usual place" for unloading cattle carried by passenger train was evidence of negligence.

But while I dissent emphatically from the opinion of the learned Judge that the answer of the jury to the third question exonerated the defendants from all negligence save in respect of the selection of the place for unloading, I cannot agree that it amounts to a finding of any negligence other than that specifically stated in the reply of the jury. The third question was as follows:—"Did Nugent and Hannon take proper precautions at the unloading of the cattle at Kingsbridge to prevent them escaping on to the public street?" To this the jury replied: "No, inasmuch as the cattle should have been unloaded at the proper cattle unloading bank."

It is obvious that if the gate, which was left open, and through which the cattle broke loose on to the public street, had been closed, the mere fact of unloading at the Military Siding, even assuming it to have been an improper place, could not have caused the injury of which the plaintiff complains, and it is quite possible that if the cattle had "been unloaded at the proper cattle unloading bank," but all the gates there had been left open, as they were at the Military Siding, the two bullocks might have stampeded on to the public street just as they did from the Military Siding.

Supreme Court. 1925.

HOWARD v. BERGIN, O'CONNOR, & Co.

FitzGibbon J.

I think the plaintiff's counsel was satisfied, and induced the jury to believe that a finding of negligence *quoad* place of unloading was sufficient, and that the jury, having found that issue in the plaintiff's favour, considered that all the subsequent events necessarily followed from that initial act of negligence, and that it was unnecessary to add any further items of negligence such as the omission to close the gate, which was a direct cause of the escape of the cattle. I cannot agree that the specification by a jury of one act, and that the first act in point of time, as negligent, amounts to a negation by them of the existence of any other negligence on the defendants' part.

But in my opinion there must be a finding of negligence *by the jury,* from which the injury to the plaintiff could reasonably arise, before I can enter judgment for the plaintiff, and I cannot take upon myself to decide that the omission to provide further assistance or to close the gate necessarily amounted to negligence in the circumstances. If it did, the rest appears to me to follow reasonably enough.

The defendants knew that precautions were necessary when unloading; that cattle "are liable to take fright when they are being unloaded." "When these animals get out of trucks they are frightened." Yet they are unloaded directly opposite to an open gate, giving direct admission to the public street, and apparently no precaution was taken to prevent escape. Also, at the later stage, after the two bullocks had gone wild and had dashed up on the plots—away from the open gate—it was possible for the jury to find, if they thought fit to do so, that Nugent might have done something more effective to prevent their escape than to "stand at the gate"—"a gate that can be closed"—that "moves on wheels and can be closed very easily." Yet he made no attempt to close it, though he was watching the terrified bullocks careering up on the plots, and then being turned and driven back at him by Hannon and the railway porter. In my opinion the jury should have been asked to find whether he was guilty of negligence in these respects or not.

If cattle in the state of terror and excitement in which these two bullocks are admitted to have been were negligently permitted to escape into a public street, I agree with my brother O'Connor that no question of *scienter* can arise. The case would not then be one of an apparently harmless animal taking sudden fright while being driven along a highway, but of an infuriated animal being permitted by negligence to escape from an enclosure in which it might have been confined, either until it had quieted down or until it had been placed under proper restraint so that it might traverse the city without endangering the lives and limbs of the public. But a finding by a jury is essential before a judgment can be given for either party.

In my opinion the action of Patrick Kelly in driving the bullocks out of his yard was not such a *novus actus interveniens*

between the original escape of the cattle (assuming that to be due to Nugent's negligence) and the injury to the plaintiff as to disentitle the latter to recover damages from the defendants for the act of their servant. The cattle were trespassers in Kelly's yard, and doing damage there, and he was entitled in self-defence to drive them out. His action corresponded to that of Willis and Ryal in the case of *Scott* v. *Shepherd* (1). It is sometimes forgotten that the discussion in that famous case really turned upon the form of action whether *trespass* would lie against Shepherd. It was decided by three Judges to one that it would, but Blackstone J., the dissentient, was pretty clearly of opinion that if the form of action had been *case* (to which the present action corresponds), the plaintiff was entitled to recover against Shepherd notwithstanding the new impetus given to the squib "by two successive rational agents." As forms of action have been long abolished, there seems to be no doubt that Kelly's intervention cannot disentitle the plaintiff to recover from the original wrongdoer.

Even if this view is wrong, there is a further aspect of the case in which the plaintiff would appear to me to have a good cause of action if the proper questions had been submitted to the jury, and had been answered by them adversely to the defendants.

The fourth question put was: "Were the defendants' men guilty of negligence in not following the escaped bullocks and getting them under proper control?" Answer: "No. If we regard Heffernan as one of the defendants' men we consider he was guilty of negligence in leaving the bullock at the yard."

In my opinion there was evidence upon which the jury might have found, if they thought fit to do so, that Heffernan was one of the defendants' men. Nugent "was the defendants' foreman drover for five years." He "got instructions to go to Kingsbridge to meet two waggons. There were to be seventeen cattle. I brought James Hannon with me. He is a drover and is a competent man." After describing the escape of the two bullocks, he goes on: "We drove the fifteen down the quays and across Watling Street Bridge and on to Prussia Street" (apparently their destination). "I met a drover called Heffernan at Prussia Street. He was a casual acquaintance. He went off in search of the two cattle, and I said to him to come back and tell me if he could find the cattle so that I could go down with more cattle to bring them back quietly. Heffernan came back to me and *I sent James Hannon and Heffernan* with a bunch of cattle to bring back the strayaways." Now, Nugent was a foreman drover. He "was in control of the unloading of the cattle" and in charge of the transit from Kingsbridge to Prussia Street. He "*brought* Hannon" and subsequently "sent Hannon and Heffernan" with orders what to do. In the absence of any contradictory evidence as to

(1) 2 Wm. Bl. 892.

Supreme Court.
1925.
HOWARD v. BERGIN, O'CONNOR, & Co.
FitzGibbon J.

Nugent's authority, a jury would be entitled to assume that it was within the scope of his employment to engage such assistance as he found necessary to conduct his cattle from Kingsbridge to their destination, and to bespeak the services of Heffernan in the emergency which had occurred. If he had no such authority, I think it lay upon the defendants to rebut the presumption arising from his position and actions. Suppose half a dozen or more of the cattle had become wild when unloaded, were two men to attempt to drive them along the streets, or had not Nugent authority actual or implied to enrol such assistance as he required?

Upon the evidence as it stood, the jury might lawfully have found that Heffernan was one of the defendants' men, and they have in fact found that he was guilty of negligence which again let loose the terrified bullocks upon an unsuspecting population.

But, here again, I cannot take upon myself to give an answer which should be given by a jury and a jury alone, and which when given would decide the case in the absence of, or in addition to, findings upon the earlier negligence alleged.

I agree that the judgment for the defendant should be set aside, but I think that the action should be remitted for a new trial, and that the costs of the trial already had should be costs in the cause.

Solicitors for the appellant: *Vincent and Beatty.*
Solicitor for the respondents: *L. J. O'Neill.*

C. L.

W. F. PHILLIPS (INSPECTOR OF TAXES), APPELLANT, *v.* THE COUNTY COUNCIL OF THE COUNTY OF LIMERICK, RESPONDENTS (1).

High Court.
1925.
May 14.

Revenue — Income Tax — County Council — Interest of moneys raised by County Council for Rural District Councils and Boards of Guardians— Claim to set off interest paid on loans by Rural District Councils and Boards of Guardians—County Fund—Local Government (Ireland) Act, 1898, sect. 51, sub-sect. 1—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), First Schedule, Sch. D., Rules applicable to Case III.

By sect. 51, sub-sect. 1, of the Local Government (Ireland) Act, 1898, the money required to meet the expenses of a Rural District Council or of a Board of Guardians is to be supplied by the County Council on demand by the District Council or Board; and the County Council is to pay the money so demanded out of the County Fund.

If, after money has been raised by a County Council to meet such demands, and while it remains in the hands of their treasurer, interest accrues to them thereon, *held* that their liability to income tax is to be determined solely by the amount of such interest, and no account can be taken of the interest paid by the Rural District Councils or by the Boards of Guardians upon money borrowed by them for purposes within the administrative county.

CASE STATED under the Income Tax Act, 1918, sect. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice. The case stated was as follows:—

"1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 23rd January, 1924, at Limerick, for the purpose of hearing appeals, the County Council of the County of Limerick, hereinafter called the respondents, appealed against an estimated assessment under Schedule D of the Income Tax Act, 1918, for the year of assessment, 1920–21, of £2,000 in respect of interest of money.

"2. At the hearing of the appeal it was agreed that in the event of the respondents being held liable, the correct amount of the assessment in respect of interest of money for the year 1920–21 should be £379 15s.

"3. The following facts were admitted or proved:—The net amount of interest allowed by the respondents' treasurer, the Munster and Leinster Bank, Limited, at Limerick, on the

(1) Before SULLIVAN P., O'SHAUGHNESSY and HANNA JJ.

High Court. 1925.

PHILLIPS v. LIMERICK CO. COUNCIL.

County Fund in its hands for the year ended the 31st March, 1920, was £379 15s. made up as follows:—

For half-year ended 30th September, 1919		£301	15	6	
Less Interest paid to Commissioners of Public Works		24	3	0	
					£277 12 6
For half-year ended 31st March, 1920 ...		£146	8	1	
Less Interest paid to Commissioners of Public Works		44	5	11	
					£102 2 2
Total for year ended 31st March, 1920 ...					£379 14 8

[Copies of the abstract of accounts of receipts and expenditure of the respondents for the two half-years above mentioned were attached to, and formed part of the case.]

"4. During the year ended the 31st March, 1920, the administrative County of Limerick, hereinafter referred to as the administrative county, comprised the following Rural Districts:—Croom, Glin, Kilmallock, Limerick, Mitchelstown, Newcastle, Rathkeale, and Tipperary; and the following Poor Law Unions were wholly or partly situate in the administrative county:—Croom, Listowel, Kilmallock, Limerick, Fermoy, Newcastle, Rathkeale, and Tipperary.

"5. Separate accounts of receipts and payments were kept by each of the Councils of the Rural Districts and by each of the Boards of Guardians of the Poor Law Unions mentioned in paragraph 4.

"6. Each of these Rural District Councils and Boards of Guardians had a Treasurer, hereinafter referred to as the Rural District Treasurers and the Union Treasurers respectively, with whom receipts were lodged and by whom payments ordered by the Rural District Council or Board of Guardians were made.

"7. During the year ended 31st March, 1920, interest was paid by the Rural District Treasurers and the Union Treasurers to the Commissioners of Public Works and the Irish Land Commission upon loans borrowed for the purposes of the respective Rural Districts and Poor Law Unions and parts of Poor Law Unions within the administrative county.

"8. The aggregate amount of the interest referred to in the preceding paragraph exceeded by much more than £379 15s. the aggregate amount of interest allowed upon credit balances in the hands of the Rural District Treasurers and the Union Treasurers.

"9. It was contended on behalf of the respondents that they were not liable to income tax in the year of assessment upon interest of money on the ground that the aggregate amount of interest paid by the respondents' Treasurer, the Rural District Treasurers, and the Union Treasurers upon loans borrowed for purposes within the administrative county during the year

preceding the year of assessment was far in excess of the aggregate amount of interest allowed by the respondents' Treasurer, the Rural District Treasurers, and the Union Treasurers upon credit balances in the hands of such Treasurers during that year.

"10. The Inspector of Taxes resisted this contention on the ground that each Rural District Council and Board of Guardians was in law a separate entity.

"11. We, the Commissioners, who heard the appeal were of opinion that the respondents were liable to income tax upon the sum of £379 15s., but, in deference to a previous decision of the Judge of the County Court of Limerick, who allowed appeals of respondents in similar circumstances for the years of assessment 1917–18, 1918–19, and 1919–20, we discharged the assessment for 1920–21.

"12. The Inspector of Taxes immediately upon the determination of the appeal declared to us his dissatisfaction therewith, as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, sect. 149, which case we have stated and do sign accordingly.

"13. The question of law for the decision of the High Court is whether the liability of a County Council to income tax upon interest of moneys is to be determined solely by the amount of interest which accrued to the County Council, or whether in arriving at such liability, account should be taken of interest paid upon moneys borrowed by Councils of Rural Districts in the administrative county, and by Boards of Guardians of Poor Law Unions wholly and partly in the administrative county for purposes within the administrative county."

Costello K.C. and *S. L. Brown K.C.* (with them *H. Wilson K.C.* and *Bewley*), for the appellant:—

County Councils and the subsidiary Rural District Councils and Boards of Guardians must be regarded as separate entities. They are independent corporations, having independent funds. Moneys raised by a County Council are lodged with their Treasurer—the Bank—and these moneys are the property of the Council and belong to no one else. Subsequently, of course, sums are paid over to the District Councils and to the Boards of Guardians on demand. When these moneys bear interest, that interest accrues to the Council, and accordingly the Council is liable to income tax thereon. The fact that the Rural District Councils and Boards of Guardians have to pay interest on moneys borrowed by them does not affect the matter, and ought not to be taken into account in arriving at the liability to income tax by the County Council. [They cited *Walsh* v. *Mayo County Council* (1); *Belfast Poor Law Guardians* v. *Belfast Corporation* (2); *Matthews* v. *Cork County Council* (3).]

(1) 39 Ir. L. T. R. 189. (2) [1912] 1 I. R. 104. (3) [1910] 2 I. R. 521.

High Court. 1925. PHILLIPS v. LIMERICK CO. COUNCIL.

Binchy and *FitzGerald K.C.*, for the respondents:—

The several Rural District Councils and Boards of Guardians in the county are only separate entities for certain purposes and are not financially independent. Each of these subsidiary bodies budgets for its own expenses and presents its demand to the County Council, and that Council pays the money when such demand is made out of the county fund: sect. 51, sub-sect 1, of the Local Government (Ir.) Act, 1898. Moreover, the accounts of the County Council in this case show that the interest which was allowed to them by their Treasurer—the Bank—and upon which income tax is now claimed, was interest upon the county fund, and that fund consisted partly of money raised by the County Council to meet the demands of the Rural District Councils and Boards of Guardians. The County Council are merely trustees of the money raised on behalf of the Rural District Councils and Boards of Guardians and ought not to be held liable to pay income tax on money which is not their own.

SULLIVAN P.:—

The question of law raised in this case is whether the liability of a County Council to income tax upon interest of moneys is to be determined solely by the amount of interest which accrued to the County Council, or whether in arriving at such liability account should be taken of interest paid upon moneys borrowed by Councils of Rural Districts in the administrative county, and by Boards of Guardians of Poor Law Unions wholly or partly in the administrative county for purposes within the administrative county.

We are of opinion that the liability of the County Council is to be determined solely by the amount of interest which accrued to the County Council.

It is admitted that under the Local Government (Ir.) Act, 1898, each County Council and each Rural District Council is a separate and distinct corporate body with separate functions and liabilities, having separate officers, and keeping separate accounts of receipts and payments. But counsel on behalf of the respondents have argued that the Rural District Councils and Boards of Guardians are not financially independent bodies, inasmuch as the money required to meet their expenses must be supplied by the County Councils upon demand, and must be paid out of the County Fund, as provided by sect. 51, sub-sect. 1, of the Local Government (Ir.) Act, 1898. They further contended that the respondents' accounts (which form part of the case stated) show that the interest which accrued to the respondents in this case was interest upon the County Fund, which consisted in part of money raised by the respondent County Council to meet the demands of the Rural District Councils and Boards of Guardians. Assuming that this contention

is correct, it does not affect the question we are asked to determine.

The duty of a County Council is to pay upon demand the money required by the District Councils and Boards of Guardians in the administrative county. If, after money has been raised by the County Council to meet such demands, and while it remains in the hands of the Treasurer of the County Council, interest accrues thereon to the County Council, then income tax is payable on such interest by the County Council. We cannot hold that in determining the amount of such liability any allowance can be made for interest paid by the Rural District Councils or Boards of Guardians upon money borrowed by them.

This case was argued on the assumption that in determining the amount of the liability in question allowance could be made for interest paid by the respondents upon money borrowed by them. We deal with the case on that basis without deciding whether such assumption is correct in law.

O'SHAUGHNESSY and HANNA JJ. concurred.

Solicitor for the appellant: *The Revenue Solicitor.*
Solicitor for respondents: *Philip O'Sullivan.*

R. R.

High Court.
1925.
May 18.
June 19.

THE ATTORNEY-GENERAL (MILLARD), APPELLANT, *v.* CORNELIUS MADIGAN, RESPONDENT (1).

Licensing Acts—Offences—Indorsement of conviction on license—Discretion of the Justice—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *sect.* 78—*Licensing Act* (*Ir.*), 1874 (37 & 38 *Vict. c.* 69), *sects.* 21 *and* 38—*Intoxicating Liquor* (*General*) *Act*, 1924 (*No.* 62 *of* 1924), *sect.* 16, *Sch. I.*

Sect. 16 of the Intoxicating Liquor (General) Act, 1924 (No. 62 of 1924), provides that where a license holder "is convicted of an offence against any of the enactments mentioned in the First Schedule to this Act . . . the conviction shall be recorded on the license of the person so convicted." Among the sections cited in the First Schedule is "Licensing Act, 1872 . . . sect. 78 (which imposes a penalty for selling drink during prohibited hours)." Sect. 78 of the Act of 1872 in fact deals with several offences, including "selling" and "exposing for sale" intoxicating liquors during prohibited hours.

A Justice, having convicted the respondent on the charge of "exposing for sale" only, and having fined him £2, held that the First Schedule to the Act of 1924 did not apply to this offence, and in the exercise of his discretion refused to endorse the license.

Held by the High Court, on case stated, that the decision of the Justice was erroneous; that the reference in the First Schedule of the Act of 1924 to sect. 78 of the Act of 1872 applied to all the offences mentioned in the latter section; that the Justice had no discretion in the matter; and that consequently the license must be endorsed.

The conviction of an offence against any of the sections enumerated in the First Schedule to the Act of 1924 must be recorded on the license.

CASE STATED by Philip O'Donoghue, Esq., Justice of the District Court, sitting at Drumcollogher, Co. Limerick, pursuant to the Summary Jurisdiction Act, 1857, and the Courts of Justice Act, 1924, on the application in writing of E. C. Millard, Superintendent of the Civic Guard, for the opinion of the High Court of Justice. The following are the material portions of the case stated:—

"At the Drumcollogher District Court held on Friday, 6th February, 1925, complainant at the instance of Superintendent Millard, Superintendent for the district, charged defendant, who is a licensed publican, on a summons with five offences under sect. 78 of the Licensing Act, 1872, namely, unlawfully selling, and unlawfully exposing for sale intoxicating liquor, to wit, in this case, porter, and opening, and keeping open his premises for such purpose, and fifthly, allowing such liquor to be consumed on his said premises, all during prohibited hours, viz. 12.5 p.m. (five minutes past twelve noon) on Sunday, 1st February, 1925. The summons was in the common form containing the five counts under sect. 78 of the Act of 1872.

(1) Before SULLIVAN P., O'SHAUGHNESSY and HANNA JJ.

"Two persons were summoned for being found on defendant's premises on the above occasion. Defendant appeared by his solicitor, Mr. Owen Binchy, and the prosecution was conducted by Superintendent Millard. The following witnesses were examined:—Sergeant O'Connell and Guard Phelan for complainant; defendant and his little son (who was not sworn), Michael O'Malley and Elizabeth Clifden for the defence.

"The following facts were admitted, or proved to my satisfaction. Defendant is the proprietor of a seven day licensed premises situate at Ballyagran in above district and county, in which premises he also carries on a grocery business. The premises are situate at the roadside. At 11.30 a.m. on Sunday, 1st February, 1925, defendant accompanied by his wife left his premises in a pony and trap. He returned alone in the trap to his licensed premises about noon. During defendant's absence from his premises the only persons left in the house were his three children, the eldest of whom, it was stated, was a boy aged thirteen years. The front door was locked during defendant's absence, but the back door of the kitchen, which communicates directly with the bar, was 'on the latch,' and it was possible for a person to enter the bar in this manner, and this was the mode of entry of Elizabeth Clifden. The bar, which through the front door communicates with the roadway, has two back doors, one leading to the kitchen and one opening on to the yard direct. These doors were unlocked when, at five minutes after twelve, Guard Phelan and Sergeant O'Connell entered the premises.

"The Sergeant entered at the back and the Guard at the front. Defendant, who was in the bar with Elizabeth Clifden and Michael O'Malley, admitted the Guard on knocking. Clifden retreated to the kitchen and O'Malley went to the yard. The former was seen through a glass porch to do this by the Guard waiting to be admitted. O'Malley admitted his leaving the bar. The latter's explanation, which was also that of the defendant, was that he was invited to the premises by the defendant for the purpose of stabling the pony with which defendant had returned home. To do this he went to the back where he found Sergeant O'Connell. He returned to the kitchen with the Sergeant and did not put up the pony and trap, which had disappeared when the Sergeant left the premises a few minutes subsequently. Clifden's explanation was that she came during defendant's absence to purchase some tea and sugar and waited for his return. She left ultimately without having effected the purchase.

"Traces of porter and empty and unclean glasses were found by Sergeant O'Connell in the bar. It was denied by all parties that any drink had been sold or consumed. I was not satisfied that there had been any sale, but I rejected the entire explanation of O'Malley's presence on the premises as tendered by himself and defendant. I accordingly convicted defendant of

High Court. 1925.

ATTORNEY-GENERAL (MILLARD) v. LIMERICK CO. COUNCIL.

exposing for sale, and fined him two pounds, and dismissed without prejudice the four remaining charges of selling, opening, keeping open, and allowing to be consumed.

"On the question which then arose of recording this conviction on defendant's license, I held that the five offences set out in sect. 78 of the Licensing Act, 1872, are separate and distinct. If the conviction in this case were for an actual prohibited sale under sect. 78, the First Schedule to the Intoxicating Liquor (General) Act, 1924 (1), makes it clear that it must be recorded. There is a discretion in the Court to say that a conviction may not be recorded where the conviction is for an offence outside the Schedule and the other mandatory provisions of the Act of 1924. With some hesitation I came to the conclusion that the First Schedule to the latter Act did not extend to the offence of which I had convicted defendant in the present case, and, exercising the discretion I thus assumed, I ordered that the conviction should not be recorded on defendant's license. At the Superintendent's request I agreed to state the case.

"And the opinion of the Court is sought as to whether I was right in holding that the recording on defendant's license of a conviction for unlawfully exposing for sale under sect. 78 is discretionary in the Court and not mandatory, and, as a consequence, whether the provision in the First Schedule to the Act of 1924 relating to sect. 78 of the Act of 1872 applies to so much of the latter section as deals with a prohibited sale and no more."

Bewley, for the appellant:—Sect. 16 of the Intoxicating Liquor (General) Act, 1924, provides that "where the holder of a license of any description authorising the sale of intoxicating liquor by retail (whether for consumption on or off the premises) is convicted of an offence against any of the enactments

(1) Intoxicating Liquor (General) Act, 1924 (No. 62 of 1924), First Schedule:—

FIRST SCHEDULE.

OFFENCES TO BE RECORDED ON LICENCES.

Licensing Act, 1872.

Section 13 (which imposes a penalty on licensed persons permitting drunkenness).
Section 14 (which imposes a penalty on licensed persons keeping a disorderly house).
Section 16 (which imposes a penalty on licensed persons harbouring constables).
Section 17 (which imposes a penalty on licensed persons permitting gaming).
Section 78 (which imposes a penalty for selling drink during prohibited hours).

Licensing Act (Ireland) 1874.

Section 16 (which imposes a penalty for refusing to admit a constable).

mentioned in the First Schedule to this Act or any enactment for the time being in force relating to the adulteration of drink, the conviction shall be recorded on the license of the person so convicted." The important word in the section is "enactments"; the section does not deal with persons who are convicted of "offences" mentioned in the Schedule. "Enactment" originally meant an Act of Parliament; but a section or part of an Act may be an enactment (*per* Ridley J., in *Wakefield and District Light Railway* v. *Wakefield Corporation* (1).) In the First Schedule to the Act of 1924 after each of the enumerated sections there are words in brackets, which, in every case except the case of sect. 78, are identical with the marginal notes in the Act of 1872; the words after sect. 78 appear to be a similar attempt to indicate shortly the nature of the section. But in each section penalties are prescribed for a number of offences, of which only the first is mentioned in the marginal note. It cannot be seriously suggested that the first mentioned offence is more serious than the others, or that it alone should be the subject of compulsory indorsement.

Binchy, for the respondent:—This is a penal statute, and any doubt must be resolved in favour of the subject. Sect. 16 of the Act of 1924 expressly speaks of a person "convicted of an offence," etc., and there are several different offences set out in sect. 78 of the Act of 1872. It is submitted that an "enactment" may mean part of a section, and each prohibition in the section is an "enactment." If the words in brackets in the First Schedule after sect. 78 had been altogether omitted, the meaning would have been perfectly clear and unambiguous, and all the offences mentioned in sect. 78 would have been included, but the words which have been inserted only refer to one particular offence. If these words are not mere surplusage, their only meaning is to limit the effect of the section to the particular offence mentioned. The rule of construction, *"expressio unius est exclusio alterius"* applies.

Cur. adv. vult.

June 19.

SULLIVAN P.:—

The respondent in this case, a licensed publican, was defendant in a summons in which the appellant was complainant. The summons charged the defendant with five distinct offences under sect. 78 of the Licensing Act, 1872, viz.:—That he did at a time prohibited by law and at a period during which his licensed premises should be closed (1) unlawfully sell intoxicating liquor; (2) unlawfully expose for sale intoxicating liquor; (3) unlawfully open his licensed premises for the sale of intoxicating liquor; (4) unlawfully keep open his licensed premises for the sale of intoxicating liquor; and (5) unlawfully allow intoxicating liquor to be consumed on his premises.

(1) 75 L. J. K. B. 388, at p. 393.

High Court. 1925.

ATTORNEY-GENERAL (MILLARD) v. LIMERICK CO. COUNCIL.

Sullivan P.

The defendant was convicted of one only of these offences, *i.e.*, of unlawfully exposing for sale intoxicating liquor, and was fined the sum of £2. The remaining charges in the summons were dismissed without prejudice.

The defendant having been so convicted and fined, the complainant applied to the District Justice to direct that the conviction be recorded on the defendant's license. The District Justice held that the recording of the conviction was discretionary, and in the exercise of his discretion he ordered that the conviction should not be recorded. Upon the application of the complainant he has stated this case for the opinion of this Court to determine the question whether he was right in holding that the recording of the conviction in this case was discretionary.

Sect. 78 of the Licensing Act, 1872, originally contained a provision that any conviction for an offence against that section should be recorded on the license of the person convicted unless the convicting Magistrate or Justices should otherwise direct. This provision was repealed by sect. 38 of the Licensing Act (Ireland), 1874, and sect. 21 of that Act enacted that where any licensed person was convicted of any offence against the Licensing Act, 1872, which by the said Act was to have been, or might have been endorsed upon the license, the Court should declare, as part of its sentence, whether it would, or would not, cause the conviction to be recorded upon the license. So the law remained until the year 1924, when the Intoxicating Liquor (General) Act, 1924, was passed.

Sect. 16 of that Act is as follows:—[Reads the section.]

The language of that section is clear. A conviction of an offence against any of the enactments mentioned in the First Schedule *shall be* recorded on the license of the convicted person. The recording of such conviction is obligatory, not discretionary. This was not disputed by counsel for the respondent, who confined his argument to the contention that the offence of which the respondent was convicted, *i.e.*, unlawfully exposing for sale intoxicating liquors during prohibited hours, is not an offence against any of the enactments mentioned in the First Schedule to the Act.

The First Schedule under the general heading: "Offences to be recorded on licenses," enumerates five sections—including sect. 78—of the Licensing Act, 1872, and one section of the Licensing Act (Ireland), 1874. The mention of each section is followed by a parenthesis commencing with the words: "which imposes a penalty on," or "for," and then mentioning the offender or offence penalised.

In the case of each section so mentioned—except sect. 78 of the Licensing Act of 1872—the words forming the parenthesis have been taken from the statutory marginal note to each section, which is a summary of the offence, or of the first offence where more than one, prohibited by the section.

The parenthesis following sect. 78 is as follows:—"which

imposes a penalty for selling drink during prohibited hours." These words have not been taken from the statutory marginal note to sect. 78, but the sale of intoxicating liquor during prohibited hours is the first offence prohibited by that section.

Mr. Binchy, on behalf of the respondent, contended before us that the words "which imposes" should be construed as meaning "in so far as it imposes"; that, on this construction, the Schedule mentions only one provision of sect. 78, viz., that prohibiting the sale of drink during prohibited hours; that this provision is in itself an "enactment" within the meaning of that word in sect. 16 of the Act of 1924, and the conviction in this case, not being a conviction of an offence against that provision, is not a conviction of an offence against any of the enactments mentioned in the First Schedule to the Act, the recording of which is obligatory under sect. 16.

Notwithstanding Mr. Binchy's able argument, I am unable to accept this construction of the statute. I am of opinion that the parenthesis following the mention of each section in the Schedule was intended to be a guide or clue to the provisions of the sections mentioned. I hold that the meaning and intent of sect. 16 and of the First Schedule is that the conviction of an offence against any of the *sections* enumerated in the Schedule must be recorded on the license.

It follows that, in my judgment, the decision of the learned District Justice was erroneous in law, and that the question asked in the case stated should be answered accordingly.

O'SHAUGHNESSY J.:—

I concur, but with very great regret. I do not believe in taking away discretion from the Magistrate, but the Act is explicit on the point, and there is nothing further to be said.

SULLIVAN P.:—Hanna J., who is unavoidably absent, has asked me to say that he concurs.

Solicitor for the appellant: *The Chief State Solicitor.*
Solicitors for the respondent: *P. T. Liston & Co.*

T. C. T.

Supreme Court.
1925.

March 20.
April 21, 22, 29.

MICHAEL CAHIR *v.* THE MINISTER FOR FINANCE (1).

Malicious injury — Right of appeal — "Party" — Minister for Finance — Claim for compensation — Forcible seizure of farm — Loss of grazing — Grass consumed by cattle of trespassers — Exclusion of compensation for consequential loss — Loss of the use of the property injured — Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5 — *Damage to Property (Compensation) Act*, 1923 (*No.* 15 *of* 1923), *sects.* 5 *and* 6 — *Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sect.* 61.

By sect. 5 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), the Minister for Finance is entitled to appear and be heard by solicitor, with or without counsel, and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies and every proceeding by way of appeal or case stated arising out of or following on any such application:

Held, having regard to the provisions of this section, that the Minister for Finance is a party entitled to appeal, under sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924), to the High Court from an order of the Circuit Court made on an application for compensation in respect of an injury to which Part II of the Damage to Property (Compensation) Act, 1923, applies.

Sect. 6 of the Damage to Property (Compensation) Act, 1923, provides that the right to compensation shall, as respects any injury to which Part II of the Act applies, be limited to compensation for the actual damage done to the property injured, "and shall not extend to any compensation for any loss consequential on such actual damage, and in particular shall not extend to compensation for the loss of the use of the property injured, or for the loss of mere pleasure or amenity."

The applicant's cattle were driven off his lands, and the cattle of strangers were put to graze on the lands for two seasons. The applicant claimed compensation under Part II of the Act for the forcible seizure and grazing of the lands:

Held, that the consumption of the grass was the only form of use to which the lands could be put, and it involved nothing more than the "loss of the use" of the lands, and therefore the applicant was not entitled to compensation.

APPEAL from an order of the High Court dated March 12th, 1925, affirming with costs the decision of the Circuit Judge awarding compensation to the respondent under the Damage to Property (Compensation) Act, 1923.

The respondent, Michael Cahir, claimed £1,000 compensation for the forcible seizure and grazing of a farm of 334 Statute acres, his property, situate at Faunrusk, County Clare, during the period July 11th, 1921, to May 12th, 1923. The application

(1) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

was heard by Judge M'Elligott K.C., Judge for the South-Western Circuit.

In November, 1920, the respondent had put 88 head of cattle on the lands. He was then fired at and ordered to take the cattle away. The cattle were turned out on the road, and from that time until January, 1924, he was unable to put any cattle of his own on the lands. During that interval other parties had, as trespassers, put between 150 and 200 cattle to graze upon the lands. The applicant estimated that the grazing of the lands was worth £280 per annum to him, less the Land Purchase annuity and the rates, amounting to £90. During the time he had been out of possession he had to pay the rates. The Circuit Judge awarded £340 compensation. From that judgment the Minister for Finance appealed to the High Court. The appeal was heard by Sullivan P. and O'Shaughnessy J., and the Court being divided in opinion on the point as to whether the Minister for Finance had a right of appeal, the decree of the Circuit Judge was affirmed, in pursuance of the provision to that effect contained in sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924) (1). From that order the Minister for Finance appealed to the Supreme Court.

The Attorney-General (*J. O'Byrne K.C.*) and *Serjeant Hanna K.C.* (with them *Costello*), for the appellant:—

The first question is whether or not an appeal lies at the instance of the Minister for Finance. By sect. 16 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), as amended by sect. 1 (1) (*c*) of the Damage to Property (Amendment) Act, 1923 (No. 43 of 1923), all claims for compensation for injuries to property which occurred after July 11th, 1921, and on or before, but not after, May 12th, 1923, and in respect of which compensation could have been given under the Criminal Injuries Acts if the Damage to Property (Compensation) Act, 1923, had not been passed, come within Part II of the latter Act. Liability to pay the compensation awarded is taken off the county and put upon the Minister for Finance: sect. 13; notice of the application has to be served upon the Minister under the provisions of the Order dated the 9th July, 1923, made by the Minister for Finance (2) pursuant to sect. 4, sub-sect. 1, of the Act; the Minister is entitled to appear and be heard by solicitor with or without counsel, to examine and

(1) Courts of Justice Act, 1924, sect. 61:—"Save as in this Act is otherwise provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two Judges of the High Court sitting in Dublin. . . . If such two Judges differ in their opinion, they shall affirm with costs the judgment or order appealed against, and an appeal shall lie at the instance of any party from such affirmance to the Supreme Court. . . ."

(2) The Order will be found set out in Bolton's Damage to Property (Compensation) Act, 1923, at pp. 70–73.

Supreme Court. 1925.

CAHIR v. MINISTER FOR FINANCE.

cross-examine witnesses and tender evidence at and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies, and every proceeding by way of appeal or case stated arising out of or following on any such application: sect. 5. By sect. 23 the expression "Criminal Injuries Acts" means the enactments specified in the Second Schedule to the Act, and sect. 5 of the Local Government (Ir.) Act, 1898 (61 & 62 Vict. c. 37), is one of the enactments specified therein. Under sub-sect. 3 of the latter section the council for the county and the council for the district in which the injury is alleged to have been committed, and also any person paying poor rate in that county may appear and be heard by the County Court; and under sub-sect. 4 any person or council who appeared, or was entitled to appear before the County Court, may, if aggrieved by the refusal or decree of the County Court, appeal. In view of these provisions it is submitted that the Minister for Finance is "a party" within the meaning of sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924).

S. L. Brown K.C. and *Overend K.C.* (with them *Shannon K.C.* and *Cullinan*), for the respondent:—

No right of appeal exists unless it be given by express enactment, or by necessary implication. Sect. 4, sub-sect. 1, of the Damage to Property (Compensation) Act, 1923, simply says that the applicant shall serve such notices in such form and on such persons "as the Minister for Finance shall prescribe." Under sub-sect. 4 the notices to be served shall be "in addition to and not in substitution for the notices prescribed by the Criminal Injuries Acts." Sect. 5 of the Act merely entitles the Minister for Finance to appear and be heard and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies, and every proceeding by way of appeal or case stated arising out of or following on any such application.

[FitzGibbon J. referred to the definition of "party" in the Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), sect. 3, namely: "'Party' shall include every person served with notice of, or attending any proceeding, although not named on the Record."]

"Party" in section 61 of the Courts of Justice Act, 1924, can only refer, in applications such as this, to a party to proceedings under the Criminal Injuries Acts, and therefore the definition in the Judicature Act has no application to this case. We submit that "party" in applications under the Criminal Injuries Acts is limited to the applicant, the County Council, the District Council, and ratepayers. Service of notice on the Minister for Finance does not make him a party. [They

cited: *Rex* v. *Otto Monsted, Limited,* (1); *Reg.* v. *Stock* (2); *Reg.* v. *Middlesex Justices* (3); *Von Stentz* v. *Comyn* (4).]

The Court intimated that they were of opinion that the Minister for Finance had a right to appeal, but reserved their reasons for that opinion until the appeal against the award was heard.

Serjt. Hanna K.C. and *Costello* (with them the *Attorney-General*), for the appellant:—

The claim by the applicant is based upon two grounds: 1, the loss of profit on each head of cattle he was able to graze upon the lands; and 2, the loss of the use of the land. His claim is barred by sect. 6 of the Damage to Property (Compensation) Act, 1923. That section provides that "the right to compensation under the Criminal Injuries Acts shall, as respects any injury to which this Part of this Act applies, be limited to compensation for the actual damage done to the property injured and shall not extend to any compensation for any loss consequential on such actual damage, and in particular shall not extend to compensation for the loss of the use of the property injured or for the loss of mere pleasure or amenity." This is in reality a claim for compensation for the loss of the use of property. If this be not so, the applicant must rely on the first portion of sect. 6 of the Act of 1923, and can only then succeed by falling back upon sect. 5, sub-sect. 1, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). That section extends sect. 135 and the following sections of the Grand Jury (Ir.) Act, 1836, so far as unrepealed, to the maliciously destroying or injuring property of any description, whether real or personal, but subject to the following proviso:— "Provided that this Act shall not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." Sect. 51 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), enacts that: "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds," shall be guilty of a misdemeanour. The case here is that the cattle put in by strangers ate the grass. But grass is not personal property, and cattle grazing on lands cannot damage the realty. Right to herbage is not "real or personal property whatsoever" within the meaning of sect. 51 of the Malicious Damage Act, 1861: *Laws* v. *Eltringham* (5); *Gardner* v. *Mansbridge* (6); *Eley* v.

(1) [1906] 2 K. B. 456.
(2) 8 Ad. & E. 405.
(3) 9 Q. B. D. 41.
(4) 12 Ir. Eq. R. 622.
(5) 8 Q. B. D. 283.
(6) 16 Cox, Cr. C. 281.

Supreme Court. 1925.

CAHIR v. MINISTER FOR FINANCE.

cross-examine witnesses and tender evidence at and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies, and every proceeding by way of appeal or case stated arising out of or following on any such application: sect. 5. By sect. 23 the expression "Criminal Injuries Acts" means the enactments specified in the Second Schedule to the Act, and sect. 5 of the Local Government (Ir.) Act, 1898 (61 & 62 Vict. c. 37), is one of the enactments specified therein. Under sub-sect. 3 of the latter section the council for the county and the council for the district in which the injury is alleged to have been committed, and also any person paying poor rate in that county may appear and be heard by the County Court; and under sub-sect. 4 any person or council who appeared, or was entitled to appear before the County Court, may, if aggrieved by the refusal or decree of the County Court, appeal. In view of these provisions it is submitted that the Minister for Finance is "a party" within the meaning of sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924).

S. L. Brown K.C. and *Overend K.C.* (with them *Shannon K.C.* and *Cullinan*), for the respondent:—

No right of appeal exists unless it be given by express enactment, or by necessary implication. Sect. 4, sub-sect. 1, of the Damage to Property (Compensation) Act, 1923, simply says that the applicant shall serve such notices in such form and on such persons "as the Minister for Finance shall prescribe." Under sub-sect. 4 the notices to be served shall be "in addition to and not in substitution for the notices prescribed by the Criminal Injuries Acts." Sect. 5 of the Act merely entitles the Minister for Finance to appear and be heard and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies, and every proceeding by way of appeal or case stated arising out of or following on any such application.

[FitzGibbon J. referred to the definition of "party" in the Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), sect. 3, namely: "'Party' shall include every person served with notice of, or attending any proceeding, although not named on the Record."]

"Party" in section 61 of the Courts of Justice Act, 1924, can only refer, in applications such as this, to a party to proceedings under the Criminal Injuries Acts, and therefore the definition in the Judicature Act has no application to this case. We submit that "party" in applications under the Criminal Injuries Acts is limited to the applicant, the County Council, the District Council, and ratepayers. Service of notice on the Minister for Finance does not make him a party. [They

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The Court intimated that they were of opinion that the Minister for Finance had a right to appeal, but reserved their reasons for that opinion until the appeal against the award was heard.

Serjt. Hanna K.C. and *Costello* (with them the *Attorney-General*), for the appellant:—

The claim by the applicant is based upon two grounds: 1, the loss of profit on each head of cattle he was able to graze upon the lands; and 2, the loss of the use of the land. His claim is barred by sect. 6 of the Damage to Property (Compensation) Act, 1923. That section provides that "the right to compensation under the Criminal Injuries Acts shall, as respects any injury to which this Part of this Act applies, be limited to compensation for the actual damage done to the property injured and shall not extend to any compensation for any loss consequential on such actual damage, and in particular shall not extend to compensation for the loss of the use of the property injured or for the loss of mere pleasure or amenity." This is in reality a claim for compensation for the loss of the use of property. If this be not so, the applicant must rely on the first portion of sect. 6 of the Act of 1923, and can only then succeed by falling back upon sect. 5, sub-sect. 1, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). That section extends sect. 135 and the following sections of the Grand Jury (Ir.) Act, 1836, so far as unrepealed, to the maliciously destroying or injuring property of any description, whether real or personal, but subject to the following proviso:—"Provided that this Act shall not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." Sect. 51 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), enacts that: "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds," shall be guilty of a misdemeanour. The case here is that the cattle put in by strangers ate the grass. But grass is not personal property, and cattle grazing on lands cannot damage the realty. Right to herbage is not "real or personal property whatsoever" within the meaning of sect. 51 of the Malicious Damage Act, 1861: *Laws* v. *Eltringham* (5); *Gardner* v. *Mansbridge* (6); *Eley* v.

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(4) 12 Ir. Eq. R. 622.
(5) 8 Q. B. D. 283.
(6) 16 Cox, Cr. C. 281.

Supreme Court. 1925.

CAHIR v. MINISTER FOR FINANCE.

Lytle (1); *Reg.* v. *Williams* (2); *Rex* v. *Hewitt* (3); *O'Neill* v. *Belfast County Council* (4). The only case in which it has been held that damage to growing grass was damage to realty is *Gayford* v. *Chowler* (5), where three men in the assertion of a right-of-way trampled on grass in a field.

S. L. Brown K.C. and *Overend K.C.* (with them *Shannon K.C.* and *Cullinan*), for the respondent:—

The forcible grazing of these lands was an injury to the freehold itself, and as the damage done exceeded £5 the case comes within section 51 of the Malicious Damage Act, 1861, and section 5 of the Local Government (Ireland) Act, 1898. Growing grass is clearly part of the freehold. The test is, can it be made the subject of larceny? Growing grass cannot be made the subject of larceny: I. Hale P.C., 510; Halsbury, vol. ix, p. 636. Injury to growing grass is an injury to the freehold: *Gayford* v. *Chowler* (5). Where a salmon river was maliciously poisoned compensation was given not only for the value of the salmon killed, but for the injury to the physical bed of the river in so far as it afforded a retreat for fish: *Meredith* v. *Kerry County Council* (6), just as the freehold here was injured by having been rendered incapable of affording grazing for the applicant's cattle. *Lord Lansdowne* v. *Kerry County Council* (7) supports this view. A growing tree is part of the freehold: *Congested Districts Board* v. *Mayo County Council* (8); *Leyburn* v. *Armagh County Council (No. 2)* (9), per Ross C., at page 64.

The damage here is not consequential damage. The claim does not extend to any compensation for any loss consequential on the actual damage, as the damage in this case is "the actual damage done to the property injured" by the eating of the grass during two seasons by the cattle of wrongdoers. Sect. 6 of the Damage to Property (Compensation) Act, 1923, preserves the right to compensation therefor.

Serjeant Hanna K.C., in reply:—

Section 32 of the Malicious Damage Act, 1861, deals specifically with the poisoning of rivers.

Cur. adv. vult.

April 29.

The judgment of the Court was delivered by O'CONNOR J.:—

In this case Michael Cahir applied to the Circuit Judge of the South-Western Circuit (Circuit No. 7) for compensation under the Damage to Property (Compensation) Act, 1923, for for forcible seizure and grazing of a farm of 334 statute acres during the period commencing on the 11th July, 1921,

(1) 50 J.P. 308.
(2) 9 Cox, Cr. C. 338.
(3) 76 J.P. 360.
(4) [1912] 2 I.R. 310.
(5) [1898] 1 Q.B. 316.
(6) 45 Ir. L.T.R. 169.
(7) 53 Ir. L.T.R. 136.
(8) 55 Ir. L.T.R. 4.
(9) [1922] 2 I.R. 58.

and ending on the 12th May, 1923. The case, therefore, came within Part II of the Act.

The Circuit Judge gave a decree for the sum of £340 on the 25th January, 1925, and an appeal was taken from that decree by the Minister for Finance to the High Court. The appeal came on for hearing before the President of the High Court and Mr. Justice O'Shaughnessy, and the applicant made the objection that the Minister for Finance had no right of appeal. The learned Judges were divided in opinion on this point, and accordingly the decree of the Circuit Court was affirmed.

The Minister for Finance appealed to this Court from that decision, and the same objection was taken by the respondent, viz.: that the Minister for Finance has no right of appeal.

It was, therefore, necessary that we should decide whether this preliminary objection was good before we proceeded further. Having heard counsel on the point, we decided that the Minister for Finance had a right of appeal, but reserved our reasoned judgment on the point until we came to give our decision on the entire case.

By the Local Government (Ireland) Act, 1898, sect. 5, claims for compensation for criminal injuries were committed for adjudication to the County Court and by sub-sect 3 of that section it was provided that the council for the county and the council for the district in which the crime was committed and also any person paying poor rate in that county might appear and be heard by the County Court. By sub-sect. 4 any person who appeared or was entitled to appear before the County Court might appeal to the Judge of Assize from the decree of the County Court. The policy of that section is perfectly manifest. It was to give a right of being heard and a right of appealing to everyone who might be affected. The whole county, or a district of a county, might be penalized, and for that reason both the county and district councils and individual ratepayers were given the right to appeal.

By the Damage to Property (Compensation) Act, 1923, the liability for certain criminal injuries—of which the injury in question in the present case is one—was thrown upon the Minister for Finance, and, as he is the person most interested, one would expect to find that the legislation which shifted the burden on to his shoulders would give him the same right to appear and take all necessary steps, including an appeal, for the purpose of defending himself against illegal or exorbitant claims. I think I am entitled to approach the new Act with this predisposition, but I cast it aside and look at the Act without any external guide as to its meaning.

By sect. 5 the Minister for Finance is declared "entitled to appear and be heard by solicitor with or without counsel . . . and generally to take part in the hearing of every application under the Criminal Injuries Acts . . . and every proceeding

Supreme Court. 1925.

RINN v. M'CARTHY.

letting shall be for the term hereinbefore mentioned and no longer, and shall not be in any way in the nature of a continuing letting, and shall absolutely determine and end on the 1st day of May, 1921." At the time of this letting the plaintiff was living in America, but he intended to return to Ireland and to live in the house himself. It was explained to the defendant by the plaintiff's brother, who was acting for the plaintiff in the matter, that the letting of the house was being made for a period of six months only to cover the period during which the plaintiff would probably be absent from this country, but this purpose of the letting was not stated in the agreement. The house had previously been let to one Patrick Bowles, who paid a rent of £42 a year, and the defendant, when he heard that Bowles was leaving, asked the plaintiff's brother to let the house to him. The defendant was an Instructor in the Department of Agriculture, and had been living in Boyle for some years previously. On the expiration of the six months, a new agreement in similar terms was entered into between the plaintiff and the defendant; and, on its expiry, a further agreement, also in similar terms, and for a period of six months only, was entered into and duly signed by the defendant. The express purpose for limiting the letting to periods of six months was conveyed to the defendant on each occasion a new agreement was signed. But in May and November, 1922, and also in May and November, 1923, the agreements which were sent to the defendant for signature—each for the term of six months—were not signed or returned by him, although he duly paid the rent reserved thereby. In the year 1924 the plaintiff decided to live permanently in America, and sold the house. In order to give possession to the purchaser, the plaintiff demanded possession from the defendant on the termination of the period ending the 1st May, 1924. The defendant having refused to give up possession, this action was brought to recover possession of the premises. No notice to quit had been served by the plaintiff. The defendant in his defence stated that his tenancy had not been determined, and he relied on the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923 (No. 19 of 1923).

The action was tried by Sullivan P. without a jury on the 23rd January, 1925. At the close of the plaintiff's case counsel for the defendant asked for a direction on the grounds:—First, that prior to May, 1924, a tenancy was existing which required some notice to terminate: *Right* v. *Darby* (1); *Dougal* v. *M'Carthy* (2); and secondly, that the defendant's possession was protected by section 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, the letting not being excluded from the operation of that section by sub-sect. 8, since, in the case of a letting for temporary convenience within the meaning of that sub-section, the purpose of such letting must

(1) 1 T. R. 159.

(2) [1893] 1 Q. B. 736.

be made known to the tenant, and this had not been done in the case of the letting made to the defendant in November, 1923, in respect of which the action was brought: *Driscoll* v. *Riordan* (1). The direction asked for was refused.

Sullivan P. accepted the evidence of the plaintiff's brother that before the first agreement was signed it was explained to the defendant that the letting was being made for a period of six months only to cover the period during which the plaintiff would probably be absent from the country, and that at the end of the first period of six months, and at the end of the subsequent period of six months, a similar arrangement was made with the defendant for a similar reason. Sullivan P. held:—First, that there was no continuing tenancy in the premises prior to May, 1924, which required to be terminated by a notice to quit before the plaintiff could recover possession; and secondly, that the letting was one made for the temporary convenience, or to meet a temporary necessity of the landlord within sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, and accordingly gave judgment for the plaintiff for possession. From this judgment the defendant appealed.

Leonard K.C. and *T. P. M'Carthy,* for the appellant:—

Prior to May, 1924, there was an existing tenancy which required some notice to terminate: *Right* v. *Darby* (2); *Dougal* v. *M'Carthy* (3). The appellant was entitled to the direction asked for, and cannot be prejudiced by the refusal to grant it. The letting was not one for the temporary convenience, or to meet a temporary necessity, of the respondent within the meaning of sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923. All the agreements are silent as to the motive of the letting, but the purpose or the motive of such lettings must be within the knowledge of both parties at the time of the making of the contract: *Driscoll* v. *Riordan* (1). [They also referred to the Landlord and Tenant (Ir.) Act, 1870 (33 & 34 Vict. c. 46), s. 69, and the Land Law (Ir.) Act, 1881 (44 & 45 Vict. c. 49), sect. 58, sub-sect. 7.]

Price K.C. and *T. J. Smyth,* for the respondent:—

The appellant by paying rent due under the agreement which he did not sign or return is bound by the terms contained therein. Furthermore, he is estopped by conduct from alleging another tenancy. Accordingly there is no continuing tenancy which requires a notice to quit to terminate. The dwelling-house was let to the appellant for the temporary convenience, or to meet a temporary necessity of the respondent within the meaning of sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923. The same considerations do

(1) 16 L. R. Ir. 235. (2) 1 T. R. 159. (3) [1893] 1 Q. B. 736.

Supreme Court. 1925. RINN v. M'CARTHY.

not apply to such a letting as to one under sect. 58, sub-sect. 7, of the Land Law (Ir.) Act, 1881, and accordingly decisions such as *Driscoll* v. *Riordan* (1) have no application.

KENNEDY C.J.:—

This action was brought to recover possession of a house and garden in the town of Boyle. It arose out of the last letting of these premises, and the terms of the letting are set forth in the writ and statement of claim. The house was let for the first time to the defendant on the 1st November, 1920, for the period of six months ending on 1st May, 1921. The plaintiff was then, and still is, absent in the United States of America. He had, however, a brother residing in the town of Boyle, who acted as his agent; and as such agent got into touch with the defendant for the purpose of negotiating a letting of the premises, the subject-matter of this litigation. These premises had only been recently purchased by the plaintiff with the intention of eventually coming to live in them himself on his return from America. It is not disputed that when the first agreement to let the premises was entered into, covering the period ending 1st May, 1921, it was made with an express reference to the absence of the plaintiff and his possible return—in which eventuality he would require possession of the house. Furthermore, according to the evidence of the plaintiff's brother, the defendant on his part was anxious to have a temporary letting, as he was expecting an early transfer to another county.

The case made by the plaintiff is that the tenancy, on the expiration of which he now seeks possession, is similar in its terms to that which was made by him at the first letting already referred to, and which was embodied in a written agreement, signed by both parties. That is to say, it was for the period of six months and no longer, and was not in the nature of a continuing letting, and was made in that way for the purpose, in fact, of meeting the requirements of temporary convenience. The plaintiff's brother says that towards the end of the first letting he approached the defendant and told him that, as his brother—the plaintiff—would not be returning from the States for another six months, he was prepared to renew the letting for a further period of six months. A new agreement was then entered into in writing on the same conditions. And at the end of the second period a third written agreement for a period of six months under similar terms was entered into. At the expiration of this third term the evidence of the plaintiff's brother was that, with reference to the four periods of six months which subsequently followed—the last of which constituted the letting in respect of which these proceedings have been taken—he informed the defendant at the beginning of each period that his brother was not coming home just then, and, as a consequence, the letting was extended. For each of these four periods of

(1) 16 L. R. Ir. 235.

six months a written agreement, couched in similar terms to the first agreement, was sent by the plaintiff's solicitor to the defendant for signature, but the defendant in no case signed it, nor did he return it. He simply sent his cheque for the consideration recited in the document to have been paid, but retained the document. In the year 1924 the plaintiff came to the conclusion that his future lay in America, that he would not require the house, and that he had better get rid of it. Consequently it was put up for sale. The defendant bid at the sale, but failed to get it. It was knocked down to another. The plaintiff then sought to recover possession of the premises at the end of the current period of six months, and relied on the letting being within sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923. The defendant, however, refused to give up possession, denied that sect. 4, sub-sect. 8, of the Act applied to his tenancy, and said that he was entitled to hold possession of the premises under the general provisions of the Act. The plaintiff then brought his action for recovery of possession.

The action was tried before Sullivan P., without a jury. The learned Judge accepted the evidence of the plaintiff's brother that before the first agreement was signed it was explained to the defendant that the letting was being made for a period of six months only to cover the period during which the plaintiff would probably be absent from this country, and that at the end of the first period of six months, and at the end of each of the subsequent periods of six months, a similar arrangement was made with the defendant for a similar reason; and he held (1) that there was no continuing tenancy in the premises which required to be terminated by a notice to quit before the plaintiff could recover possession; and (2) that the letting was made for the temporary convenience, or to meet a temporary necessity, of the landlord within sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923.

This Court is asked to say that the Judge was wrong in finding that a tenancy within the protection of the Act did not exist. The nature of the tenancy that existed is an inference of fact, and as there is evidence on record to support this finding it cannot be disturbed. Then, again, it is urged that the letting was not for a temporary convenience or to meet a temporary necessity, and that the Judge should not have so found. This, again, is a point which turns on a finding of fact, and as there is ample evidence to support the Judge's finding it cannot be impeached.

It would appear that at the hearing of the action Mr. Leonard asked for a direction, and submitted to the trial Court that the evidence given on behalf of the plaintiff amounted to evidence of a letting from year to year. He now complains that through the refusal of the Judge to give such direction he was forced to call the defendant, who admitted in cross-examination that

Supreme Court. 1925.

RINN v. M'CARTHY.

Kennedy C.J.

he had had a conversation with the plaintiff's brother in November, 1923, about renewing the tenancy, and that the latter had told him that his brother (the plaintiff) would not be returning home for six months, and that his solicitor would send on the agreement for signature. He further admitted that the plaintiff's brother was apparently under the impression that he (the defendant) had signed the other agreements. Defendant's counsel in face of this cannot now be allowed to make a case of a yearly letting which is based on the absence of signed agreements.

It has been urged by Mr. Leonard that the letting was not for the purpose of a temporary convenience or to meet a temporary necessity within the meaning of sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, inasmuch as the purpose of the temporary letting was not expressly made known by the plaintiff to the defendant at the time of the last letting, and was not present to their minds. On the facts which were before the President of the High Court, and which are now before this Court, I can see no reason for saying that the purpose which necessitated the tenancy being one for the temporary convenience of the plaintiff was not known to the defendant at the time of the letting, or was not present to his mind. It was certainly known to the defendant at the time of the first letting and the subsequent lettings had reference thereto. The evidence is, to my mind, clear that the premises were to be let until the plaintiff returned from America, and Mr. Leonard had great difficulty in urging that such was not a letting for a temporary convenience. There are cases to be found in the Reports, decided under the Land Acts, where property, let during absence in America, in similar circumstances to those disclosed by the evidence in this case, has been held to have been let for a temporary convenience or to meet a temporary necessity. On the whole case I am of opinion that the finding on the facts and the conclusion of law of the learned President cannot be disturbed. The appeal must be dismissed with costs.

O'CONNOR J.:—

I agree. The first letting was made on the 1st day of November, 1920. That was an agreement in writing under which the premises were let for a period of six months, and six months only, at a rental of £23. The agreement contains a remarkable clause, which reads as follows:—"The letting shall be for the term hereinbefore mentioned and no longer, and shall not be in any way in the nature of a continuing letting, and shall absolutely determine and end on the said 1st day of May, 1921." No doubt in that clause there is no express mention that the premises were let for the temporary convenience or to meet a temporary necessity of the landlord, yet there is the suggestion that that was the intention. We have it, however, proved by the evidence of the plaintiff's brother, that the express purpose

for limiting the letting to a period of six months was conveyed to the defendant when the agreement was executed, and it was explained to him that it was to meet the temporary convenience of the plaintiff, who was absent in America. The purpose of the letting was, therefore, expressed and known at the first letting, which began on the 1st of November, 1920. All subsequent agreements to let were for fixed periods of six months and were in similar terms and contained the particular clause to which I have already drawn attention. When the second agreement to let was signed the defendant well knew the reason that was operating on the mind of the plaintiff in fixing the term at six months. The same remarks apply to the third agreement. It could not have been said, if possession had been sought by the plaintiff at the termination of the above three terms, that the letting had not been for a temporary convenience or to meet a temporary necessity. On the 1st of May, 1922, on the termination of the agreement for the previous six months, another agreement in similar terms to the previous ones for a further six months was sent to the defendant by the plaintiff's solicitor for signature and return. The defendant did not sign the agreement, but kept it and forwarded the rent due thereunder to the plaintiff's solicitor. In November, 1922, and also in May and November, 1923, similar agreements were also sent to the defendant for signature. He, however, did not sign them nor even return them, but paid the rent due. Why did he act in that way? I am satisfied that he pursued this plan for the secret purpose of changing and enlarging the tenure of his possession and to get away from the original purpose of the letting. Inasmuch as the defendant paid the rent due under the agreement which he neither signed nor returned, I am of opinion he is now estopped from alleging another tenancy and is bound by the terms of the agreement sent for signature, but retained. He is in the same position as that in which he formerly was under the terms of the last agreement he had signed, and by which he would have been bound for a period of six months only, and which was not a continuing tenancy. The defendant must have brought his mind back to the original letting at the beginning of every subsequent term and known that the final letting was for a period of six months only, and to suit the temporary convenience of the plaintiff, who was absent in America. There is nothing in law to support the contention that a letting for a temporary convenience or to meet a temporary necessity must be confined to a definite and fixed period of time. The plaintiff may have had a fixed limit of six months present to his mind at the first letting, but have been prevented from time to time from terminating each agreement.

We are, however, relieved from all difficulty, as the learned President of the High Court found as a fact that there was a tenancy made for a temporary convenience or to meet a temporary necessity of the landlord—the plaintiff—and there is ample evidence to support that finding.

Supreme Court. 1925.

RINN v. M'CARTHY.

FITZGIBBON J.:—

I agree. I think the statement by the President of the High Court that he accepted the evidence of the plaintiff's brother in which he said that before the first agreement was signed it was explained to the defendant that the letting was being made for a period of six months only, to cover the period during which the plaintiff would probably be in America, and that at the end of each subsequent period of six months a similar arrangement was made and for similar reasons, puts the defendant out of Court. With that finding there is an end to the case even on the assumption that the motive for a letting for temporary convenience must be made known and present to the minds of both parties at the time of letting. Whether the motive must be made known and present to the minds of the parties I express no opinion. Dowse B. in *Driscoll* v. *Riordan* (1) did say that for the purposes of a letting for a temporary convenience within the meaning of sect. 58, sub-sect. 7, of the Land Law (Ir.) Act, 1881, both parties must have the purpose of the letting present to their minds at the time of making the contract, but I am by no means satisfied that the same considerations apply to sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923. It seems to be going far to say that a man who lets a house in a town for a term of six months or even longer for strictly private reasons must disclose those reasons at the time of the letting, and that, if he fails to do so, the tenant at the end of the term may refuse to give up possession because those reasons had not been explained to him. When the question arises it will be necessary to decide it, but for the present I desire to refrain from expressing any opinion. In the case of *Driscoll* v. *Riordan* (1) just quoted, Palles C.B. in referring to the direction given by the trial judge on this very point said:—"I am not at present prepared to say that so far the direction is not entirely correct. It is not necessary absolutely to decide the question, as it does not arise." I adopt that attitude. The case of *Earl* v. *Neill* (2) has some resemblance to the present case. There, the plaintiff, being desirous of going to America for a period of ten years, let the premises to the defendant for that time during his absence. The defendant at the expiration of the term served an originating notice to have a fair rent fixed claiming a tenancy from year to year, and it was held that the letting was one to meet a temporary necessity within the meaning of sect. 58, sub-sect. 7, of the Land Law (Ireland) Act, 1881.

Solicitor for the plaintiff: *Joseph Delany.*
Solicitor for the defendant: *Christopher E. Callan.*

R.L.S.

(1) 16 L. R. Ir. 235.

(2) R. & D. 244.

THE KING AT THE PROSECUTION OF W. J. ALEXANDER, SECRETARY OF THE ALEXANDER SHIPPING COMPANY, LTD., *v.* JUDGE OF THE CIRCUIT COURT FOR CORK.

High Court. 1924. Nov. 24. Dec. 19.

Supreme Court. 1925. Feb. 12, 13, 16. April 29.

Jurisdiction—Irish Free State Courts—Workmen's Compensation Act, 1906 *—Accident causing death of seaman—Dependant resident in Irish Free State—British ship—Owners resident in England—Ship not within the territorial limits of Irish Free State—Claim for compensation—Circuit Court — Prohibition — Legislative powers of the Irish Free State — Validity of laws affecting foreigners—Application of maxim, "Extra territorium jus dicenti impune non paretur"—Workmen's Compensation Act,* 1906 (6 & 7 *Ed.* 7, *c.* 58), *sects.* 2, 7, 8, 11; *Sch. I, Art.* 18; *Sch. II, Arts.* 11, 18—*Irish Free State (Agreement) Act,* 1922 (12 *Geo.* 5, *c.* 4), *sect.* 1; *Sch., Arts.* 1, 17, 18—*Irish Free State Constitution Act,* 1922 (*Session* 2) (13 *Geo.* 5, *c.* 1), *sect.* 1, *Sch.—Irish Free State (Consequential Provisions) Act,* 1922 (*Session* 2) (13 *Geo.* 5, *c.* 2), *sect.* 6—*Constitution of the Irish Free State (Saorstát Éireann) Act,* 1922 (*No.* 1 *of* 1922), *sects* 1, 2, *Sch. I, Arts.* 2, 12, 64, 65, 66, 73, 75, 83; *Sch. II, Arts.* 1, 17, 18—*Adaptation of Enactments Act,* 1922 (*No.* 2 *of* 1922), *sects.* 3, 11—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 37, 51—*Consolidated Workmen's Compensation (Ir.) Rules,* 1917 (*Stat. R. & O.* 1917, *No.* 529), *Rules* 14, 81, 83—*Provisional Government (Transfer of Functions) Order,* 1922 (*Stat. R. & O.* 1922, *No.* 315)—*Irish Free State (Consequential Adaptation of Enactments) Order,* 1923 (*Stat. R. & O.* 1923, *No.* 405).

A seaman, one of the crew of a British ship registered at the Port of London, was washed overboard and drowned at sea. The ship was owned by an English company, having its registered office in London, and having no place of business or agent in the Irish Free State. The contract of service between the owners of the ship and the seaman was entered into at Cardiff, in Wales. The ship was never, at any material time, within the territorial limits of the Irish Free State. The seaman's mother, who resided in Cork, claimed compensation under the Workmen's Compensation Act, 1906, as a dependant of the deceased, and filed a request for arbitration under that Act, to be heard by the County Court Judge of Cork (East Riding), relying on Rule 81 (2) (iii) of the Consolidated Workmen's Compensation (Ir.) Rules, 1917, which provides that in the case of an accident occurring at sea the matter may be heard by the Judge of the County Court in the division in which the dependants of the workman who claim compensation, or some of them, reside. Before the arbitration proceedings could be heard, County Court Judges in the Irish Free State were replaced by Judges of the Circuit Court appointed pursuant to the Courts of Justice Act, 1924 (No. 10 of 1924). The owners of the ship having applied for a writ of prohibition to prohibit the Circuit Court Judge for Cork from proceeding with the arbitration:

Held by the Supreme Court, reversing the High Court, that liberty to issue the writ should be granted,

Per Kennedy C.J. (O'Connor J. concurring), because the Judge of the Circuit Court had no jurisdiction to entertain the application for arbitration, as there must be express reciprocal legislation founded on convention or agreement to give effective jurisdiction in such a case, and further, that prohibition was an apt and convenient remedy;

Per FitzGibbon J., because the rule relied on by the applicant for compensation as giving jurisdiction to the Circuit Court was invalid, and there was no more adequate method of dealing with the case than by granting prohibition.

Turner v. *Kingsbury Collieries, Ltd.,* [1921] 3 K.B. 169, not followed.

R. (Armstrong) v. *County Court Judge of Wicklow,* [1924] 2 I.R. 139, considered.

High Court. 1924.

R. (ALEXANDER) *v.* CIRCUIT JUDGE FOR CORK.

Validity of laws passed by the Irish Free State affecting subjects of another country considered.

Application of the maxim, "Extra territorium jus dicenti impune non paretur," in *Macleod* v. *Attorney-General for New South Wales*, [1891] A.C. 455, discussed by FitzGibbon J.

PROHIBITION.

Michael Allen, a seaman serving on the s.s. "Malmesbury," while engaged in repairing a ventilator on the deck of the ship, was washed overboard and drowned on the 27th April, 1924. The ship was then on a voyage from Rotterdam to Cagliari, in Sardinia. The contract of service during which the accident occurred was entered into between Michael Allen and the owners of the ship at Cardiff, in Wales, where the deceased seaman joined the ship as a boatswain on the 23rd of February, 1924. The ship was a registered British ship of the Port of London, owned by the Alexander Shipping Co., Ltd., an English company incorporated under the Companies Acts, having their registered offices at 4 St. Mary Axe, London, and having no office, or place of business, or agent in the Irish Free State. On the 1st August, 1924, the Secretary of the company, Mr. Waldemar Joseph Alexander, received by post a request for arbitration under the Workmen's Compensation Act, 1906, which was headed: "County Courts, Ireland. Application for arbitration by or on behalf of the dependants of deceased master, seaman, apprentice, or pilot. In the County Court of Cork, County, East Riding, Division of Cork." The request for arbitration stated that the matter therein set out would be heard by the Judge of the next Court of competent jurisdiction at the sessions to be held at the Court-house in Cork, for the Division of Cork, on the 9th day of October, 1924. This request for arbitration was issued at the suit of Ellen Allen, who resided at Kinsale, Co. Cork, the mother of the said Michael Allen, claiming compensation as one of his dependants.

The Courts of Justice Act, 1924 (No. 10 of 1924), was passed by the Oireachtas on the 12th April, 1924, providing for the establishment of the new Courts for the Irish Free State pursuant to the Constitution. Sect. 2 of the Act provided that the Act should come into operation on such day or days as might be fixed therefor by any Order or Orders of the Executive Council, and different days might be fixed for the commencement of the Act for different purposes, provided that no such day be later than five months after the passing of the Act. Part II of the Act deals with the Circuit Court, and the Act came into operation for the purposes of that Part of the Act throughout the Irish Free State (with the exception of Dublin City and County) on the 6th day of August, 1924 (1). By

(1) For references to the Orders bringing the different Parts of the Courts of Justice Act, 1924, into operation, see note *ante*, p. 62.

sect. 51 of that Act there was transferred to the Circuit Court all jurisdiction not expressly excepted which, at the commencement of the Act, was vested in County Court Judges in the Irish Free State (1).

On 2nd September, 1924, counsel moved, on the affidavit of W. J. Alexander, the Secretary of the Company, for a conditional order for a writ of prohibition directed to the Circuit Judge for Cork prohibiting him from hearing or entertaining the application for arbitration, and Murnaghan J., who heard the application, made an order that the prosecutor be at liberty to serve such notice as he might be advised of an application to be made on the second day of the next sittings for a conditional order for a writ of prohibition. In pursuance of this order of Murnaghan J., notice, dated 6th October, 1924, was served upon the Clerk of the Peace for the East Riding of Cork for and on behalf of the Circuit Judge for Cork, that an application would be made on 27th October, 1924, for a conditional order for a writ of prohibition, the grounds of the application being that the said Circuit Judge had no jurisdiction to hear or entertain the said arbitration proceedings. On November 24th, 1924, the application came on for hearing before the High Court.

Another application for a writ of prohibition was heard at the same time, viz.:—the King, at the prosecution of S. R. Thomas, Secretary of the Town Line (London), Ltd., *v.* the Circuit Court Judge for Cork, to prohibit the Judge from hearing a request for arbitration under the Workmen's Compensation Act, 1906, filed by John Allen, of Kinsale, County Cork, the Town Line (London), Ltd., being the respondents in the request for arbitration. The facts in the two cases were similar, except that in the latter case the applicant for compensation was the injured workman himself, not a person claiming to be a dependant, as in the first case. The facts in the second case sufficiently appear for the purposes of this report from the judgment of Murnaghan J.

Serjeant Hanna K.C., *Jellett K.C.*, and *Sainsbury*, for the prosecutor, W. J. Alexander, the Secretary of the Alexander Shipping Company, Ltd., in the first case, and for the prosecutor, S. R. Thomas, the Secretary of the Town Line (London), Ltd., in the second case.

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(1) Sect. 51—"There shall be transferred to the Circuit Court all jurisdiction not hereinbefore expressly excepted which, at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions, or any of the same in Saorstát Éireann (save such jurisdiction of Justices at or of Courts of Quarter Sessions as is hereinafter conferred on or transferred to the District Court) and the provisions of Sections 21 and 22 of this Act shall apply *mutatis mutandis* to the jurisdiction vested in and transferred to the Circuit Court by this Act."

High Court. 1924.

R. (ALEXANDER) *v.* CIRCUIT JUDGE FOR CORK.

Dec. 19.

Costello, for the Judge of the Circuit Court for Cork (Judge H. D. Conner K.C.).

Hungerford, for Ellen Allen and John Allen.

Cur. adv. vult.

The judgment of the High Court (Sullivan P., O'Shaughnessy and Murnaghan JJ.) was delivered by Murnaghan J.

MURNAGHAN J.:—

The applications made for writs of prohibition in these two cases raise the question whether the respondents, who are English companies registered in England, are entitled to refuse to submit to the jurisdiction of the Circuit Judge for the County of Cork in applications for compensation under the Workmen's Compensation Act. In one of these applications under the said Act, John Allen, of Kinsale, in the County of Cork, is the applicant, and the Town Line (London), Ltd., are named as respondents. The s.s. "Courtown" is the property of the Town Line (London), Ltd., and is a British ship registered in the Port of London. John Allen joined the ship as an able-bodied seaman at Cardiff on 18th October, 1923, and the injury, which is the subject-matter of the claim for compensation, occurred on 13th February, 1924, on the high seas whilst the ship was on a voyage from the River Plate to Hull. The request for arbitration was served on the respondents on 6th August, 1924, at the registered office of the company, situate at Cardiff, by registered post. In the other application under the said Act, Ellen Allen, of Kinsale, is the applicant, and Capper, Alexander and Co., owners of the s.s. "Malmesbury," are named as respondents. The workman, Michael Allen, joined this ship at Cardiff on 23rd February, 1924, and was washed overboard and drowned on 27th April, 1924, when the ship was on a voyage from Rotterdam to Cagliari. The s.s. "Malmesbury" is registered at the Port of London.

The Workmen's Compensation Act, 1897, did not extend to seamen as such, but the Workmen's Compensation Act, 1906, brought seamen within the scope of the Act in accordance with the terms of section 7. By that section it is provided: "This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom," and the section contains further modifications not material to the questions raised in the present applications. If any question arises in any proceedings as to the liability to pay compensation, the question, if not

settled by agreement, is, subject to the provisions of the First Schedule to the Act, to be settled by arbitration in accordance with the Second Schedule to the Act: see section 1, sub-section 3, of the Act. The relevant provisions of the Second Schedule direct that the matter shall be settled by the Judge of the County Court according to procedure prescribed by Rules of Court.

Clause 11 of the Second Schedule provides that where any matter under the Act is to be done in a County Court, or by, to, or before the Judge or registrar of a County Court, then, unless the contrary intention appear, the same shall, subject to Rules of Court, be done in, or by, to, or before the Judge or registrar of the County Court of the district in which all the parties concerned reside, or if they reside in different districts, the district prescribed by Rules of Court, without prejudice to any transfer in manner provided by Rules of Court. Clause 18 of this Schedule provides that in the application of the Schedule to Ireland the expression "Judge of the County Court" shall include the Recorder of any city or town, and an appeal shall lie from the Court of Appeal to the House of Lords.

The Workmen's Compensation Act, 1906, was enacted by the Parliament of the United Kingdom, and the provisions of the Act were made applicable to the inhabitants of England, Ireland, and Scotland. These three countries had in the year 1906 separate and distinct judicial systems, and there might be room for doubt whether the content of the enactment bound the residents of one of these countries to appear in the County Court or equivalent Court of any of the other countries. This question had, however, arisen under the Workmen's Compensation Act, 1897, in the case of *R.* v. *Owen* (1). Clause 9 of the Second Schedule to that Act selected as the proper forum the County Court of the district in which all parties resided, or, if they resided in different districts, the district in which the accident out of which the said matter arose occurred. The King's Bench Division in England held that under the Act an application could be brought in the Newport (Monmouth) County Court, which was the Court of the district in which the accident took place, against an employer who was resident in Scotland, outside the jurisdiction of the English Courts. Lord Alverstone in his judgment, at page 439, said: "This Act was intended to apply to all parts of the United Kingdom, and the employers within the whole area were intended to be made liable under its provisions, and, if a Scottish employer were held to be outside of its provisions, that would clearly be a *casus omissus.*" Again, at page 440, he said: "I think that the real substantial effect of that clause is that, if the persons concerned are not all subject to the jurisdiction of one Court contemplated by the Act, then the jurisdiction is to be where the accident occurred." This decision is equally applicable to the Workmen's Compensation

(1) [1902] 2 K.B. 436.

High Court. 1924.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

Murnaghan J.

Act, 1906, and the forum, it must be observed, is a statutory one, selected for the convenience of the workman or his dependants. In no case under the statute or the rules is the place of residence of the respondent selected as the proper forum when the parties reside in different districts.

Under Clause 11 of the Second Schedule to the Act of 1906 special rules were made as to the proper forum in claims by seamen or their dependants. The Consolidated Workmen's Compensation (Ireland) Rules, 1917 (Statutory Rules and Orders, 1917, No. 529), provided, by Rule 81, that where the accident out of which the matter arose occurred at sea, the proceedings might be brought (i) in the division in which the ship should be when the matter was to be done, or (ii) in the division comprising the port of registry of the ship, or (iii) in the division in which the workman, or the dependants of the workman, or some or one of them resided. By Rule 83 power was given to the County Court to transfer proceedings to any County Court in England or Scotland. It is obvious that such a power of transfer was necessary, *e.g.* if several dependants brought applications in the different countries in which they respectively resided.

I have dealt at some length with these material provisions of the Workmen's Compensation Act, 1906, with the view of examining it in two distinct aspects, viz.: (i) the application of the Act; (ii) the contents of the enactment, because it is necessary to see what effect the coming into being of the Irish Free State had upon both these branches of its interpretation.

On 6th December, 1921, Articles of Agreement for a Treaty between Great Britain and Ireland were signed, and these Articles were subsequently approved in accordance with Article 18. Under Article 1 Ireland became an independent State known as the Irish Free State, subject, however, to the remaining Articles of the Agreement for a Treaty, one of which, Article 17, made a provisional arrangement for the carrying on of government pending the adoption of the Constitution. From the point of view of British legal theory it was necessary to give the force of law to the Articles of Agreement by statute, and on 31st March, 1922, the Irish Free State (Agreement) Act was passed for this purpose. The coming into being of the Irish Free State would, in accordance with the principles of international law, have carried with it inside the territory of the Irish Free State the laws then in force in the said territory, but these laws would have had no force outside such territory. This result must have been recognised, for, by Order in Council (1), dated 1st April, 1922, made in pursuance of the Irish Free State (Agreement) Act, it is provided by Clause 13, sub-clause 1, that: "Subject to any Act of the Provisional Parliament and to the provisions of this Order and any other Order made under

(1) The Provisional Government (Transfer of Functions) Order, 1922 (Stat. R. & O. 1922, No. 315).

the Irish Free State (Agreement) Act, 1922, all existing laws, institutions, and authorities in Southern Ireland, whether judicial, administrative, or ministerial, shall continue as if this Order had not been made, subject to the modifications necessary for adapting them to this Order and in particular to the modifications hereinafter set forth." One of the modifications, I may point out, would be the substitution for the Secretary of State in section 8 of the Workmen's Compensation Act, 1906, of the appropriate officer of the Provisional Government. This Order in Council bound all persons subject to the authority of the British Parliament and enabled the existing laws and jurisdiction in the Irish Free State to bind extra-territorially pending the provisional arrangement.

Ultimately, the Constitution was adopted by Dáil Éireann, sitting as a Constituent Assembly in the Provisional Parliament. The document known as "the Constituent Act" (1) contains Dáil Éireann's acknowledgment that all lawful authority comes from God to the people, and Dáil Éireann thereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Éireann), and in the exercise of undoubted right, decrees and enacts the Constitution set forth in the First Schedule to "the Constituent Act," but subject to the Articles of Agreement set forth in the Second Schedule thereto which are given the force of law, and which are, in case of conflict with any provision of the Constitution, or any amendment thereof, or any law made thereunder, to prevail.

Article 2 of the Constitution enacts that all powers of government and all authority, legislative, executive, and judicial in Ireland are derived from the people of Ireland, and that the same shall be exercised in the Irish Free State through the organisations established by or under, and in accordance with, the Constitution. Article 83 of the Constitution provided that the passing and adoption of the Constitution by the "Constituent Assembly" and the British Parliament was to be announced as soon as might be, and in accordance with this provision the Constitution came into operation on the 6th day of December, 1922. Article 12 created a Legislature to be known as the Oireachtas, and provided that the sole and exclusive power of making laws for the peace, order, and good government of the Irish Free State is vested in the Oireachtas. Articles 64 to 72 deal with the judicial power of the Irish Free State, and provide that the judicial power should be exercised and justice administered in the public Courts established by the Oireachtas by Judges appointed in manner thereinafter provided. Time would obviously be required by the Oireachtas for the establishment of such Courts, and accordingly by one of the Transitory Provisions (Article 75) it was provided that until Courts had been established for the Irish Free State by the

(1) [So referred to in the Irish Free State Constitution Act, 1922 (Session 2) (13 Geo. 5, c. 1).—ED.]

High Court. 1924.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

Murnaghan J.

Oireachtas, the Courts therein specified "as at present existing" should, for the time being, continue to exercise the same jurisdiction as theretofore. In my opinion, by the rules of international law, founded upon the necessity of the case, this result would have followed so far as intra-territorial jurisdiction was concerned. In the same way, by Article 73, it was provided that "subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by the enactment of the Oireachtas." The phrase "laws in force" is a comprehensive one and includes, in my opinion, all public laws dealing with constitutional, administrative, and criminal matters, and all laws creating rights in favour of, or imposing duties upon all private individuals; but these laws are by the express terms of Article 73 void so far as they are repugnant to the Constitution. They are also void so far as they are repugnant to the Articles of Agreement for a Treaty.

Now, it has been strenuously argued by Serjeant Hanna in support of the application for prohibition that in accordance with the doctrines of international law the Irish Free State cannot legislate extra-territorially, and he cites the authority of the cases: *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (1); *Rousillon* v. *Rousillon* (2); and *Macleod* v. *Attorney-General for New South Wales* (3). In my opinion, there are no circumstances in the facts of the present case which would justify the Irish Free State in legislating for, or exercising jurisdiction over the applicants in these motions, who are neither domiciled in nor resident in the Irish Free State, and I accept fully this argument so far as it carries. Mr. Costello, however, argues in support of the jurisdiction of the Circuit Court for Cork in this way. He contends that the Irish Free State has bound only citizens or residents in the Irish Free State, but that Great Britain by adopting the Constitution in the manner in which it did, by passing the Irish Free State Constitution Act, 1922 (Session 2), has bound its subjects domiciled or resident in Great Britain and such parts of Ireland as may be outside of the territory of the Irish Free State, and that in this way, by the conjoint authority of the two legislatures, all the persons who were previously bound by the Act as it applied to the United Kingdom are now equally bound by the provisions of the Workmen's Compensation Act, 1906; and in this manner he argues that the phrase "the laws in force" must mean the same laws as previously existed. The ambiguous use of this phrase has been noticed in the case of *R.* (*Armstrong*) v. *County Court Judge of Wicklow* (4), judgment in which was delivered on 23rd May,

(1) [1894] A.C. 670.
(2) 14 Ch. D., at p. 371.
(3) [1891] A.C. 455.
(4) [1924] 2 I.R. 139.

1924, by the late Court of Appeal. In that case, dealing with the precise point in controversy here, it was held by the Court that the County Court of Wicklow had, under Article 75, or Articles 73 and 75 combined, jurisdiction in circumstances like those at present under consideration. The Master of the Rolls, however, delivered a written judgment doubting the existence of such jurisdiction, and Mr. Justice Pim and, as appears from the report, Ronan L.J. limited their decisions to the Courts as then existing. This decision does not decide the point now under consideration except so far as it decides that Article 75 of the Constitution could bind non-residents during the transitional period.

High Court. 1924. R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK. Murnaghan J.

After careful examination of the Constitution I have come to the conclusion that "the laws in force in the Irish Free State at the date of the coming into operation of this Constitution" must be interpreted in the light of Article 83, and that regard must be had to the fact that the Constitution comes into being couched in language passed and adopted by Dáil Éireann as a Constituent Assembly and by the British Parliament. It seems to me clear that both authorities had power to re-enact over their respective subjects the same law as formerly prevailed so long as there was one common authority. One of the laws in force in Ireland at the date of the coming into operation of the Constitution gave to a seaman in certain specified cases—all of which exist in the present cases—if such seaman were resident in Ireland, the right to sue in Ireland the owners of a ship resident in England. The British Parliament clearly has power to bind throughout Britain and such part of Ireland as may not be within the territory of the Irish Free State its subjects to submit to the judicial power of the Irish Free State, as well as to obey the content of the enactments passed by the British Parliament. I do not see why the Irish Free State has not a similar power over its citizens. It is true that the results could not have been arrived at save by the conjoint action of Dáil Éireann and the British Parliament. This conjoint legislation may, no doubt, produce divergent results. In any case heard within the Irish Free State there will be no appeal to the House of Lords from a decision of the Supreme Court inasmuch as Article 73 imports the provisions of Article 66, and these are inconsistent with any such appeal. In England, however, an applicant or a citizen of the Irish Free State liable to be sued there will have such an appeal. Other differences of a similar character may arise. But similar difficulties arise upon the contrary view. Has the Oireachtas enacted sect. 7 of the Act in its original form dealing with ships registered in the United Kingdom? Clause 18 of the First Schedule to the Act provides that if a workman receiving a weekly payment ceases to reside in the United Kingdom he may lose his right to receive such weekly payment. In what form is this section now in force in the Irish Free State? None of these difficulties

High Court. 1924.

R. (ALEXANDER) *v.* CIRCUIT JUDGE FOR CORK.

Murnaghan J.

in interpretation on one side or the other outweighs, in my opinion, the guide to the interpretation derived from Article 83 above referred to.

Article 73 is in itself a transitory provision, and under this Article the laws in force were to continue to be of full force and effect until the same or any of them should have been repealed or amended by enactment of the Oireachtas. In the Adaptation of Enactments Act, 1922 (No. 2 of 1922), the Oireachtas, after reciting Article 73 of the Constitution, recites: "And whereas all Acts passed by the British Parliament which were in force on the 6th day of December, 1922 (being the date of the coming into operation of the Constitution aforesaid), in the area now comprised in Saorstát Éireann will, by virtue of the said Article 73, have the force of law in Saorstát Éireann;" and it further recites that it is necessary, in order to enable such Acts to have full force and effect in Saorstát Éireann, that certain interpretations and adaptations of such Acts and of all orders, rules, and regulations made thereunder should be made. In sect. 3 the name "Ireland," whether used alone or in conjunction with the expression "Great Britain" or by implication as being included in the expression "United Kingdom," is declared to mean Saorstát Éireann for the purpose of the construction of any British Statute. It has not been argued, nor, indeed, can it be argued, in my opinion, that the effect of this section is to substitute "Saorstát Éireann" for "United Kingdom" in every case where the phrase "United Kingdom" occurs in any British Statute. Sect. 11 substitutes the proper Minister for the Secretary of State referred to in sect. 8 of the Workmen's Compensation Act. We have not, however, been referred to any repeal or amendment of the law in force on the 6th December, 1922, except the provisions of the Courts of Justice Act, 1924, which gives to the Circuit Court all jurisdiction which, at the commencement of the Act, was vested in the Judge of the County Court; indeed, the entire argument has been based on the interpretation of Article 73, which, it is claimed, was never intended to legislate for non-resident foreigners.

After the passing of the Irish Free State Constitution Act, the British Parliament passed the Irish Free State (Consequential Provisions) Act, 1922, and by sect. 6 of that Act it was provided that His Majesty might, by Order in Council, make such adaptations of any enactments so far as they related to any of His Majesty's Dominions other than the Irish Free State as might appear to him necessary or proper as a consequence of the establishment of the Irish Free State. In pursuance of this power an Order in Council was made in March, 1923:—the Irish Free State (Consequential Provisions) Order (Statutory Rules and Orders, 1923, No. 405). This Order was carefully framed, and made changes in all statutory enactments, with certain specified exceptions; but it must be noted that these changes

were made in the application of these enactments to any part of Great Britain and Ireland other than the Irish Free State. In other words, the Acts retained their original vigour in their application to the Irish Free State by force of Article 73 of the Constitution.

It may be considered necessary or proper that the Oireachtas, after full consideration of the details, should pass corresponding legislation; but any change in the laws as affecting the Irish Free State is reserved to the Oireachtas. I may point out that the present rules in England purport to allow service on a respondent resident in Ireland: see Rule 16, clause 6.

I am conscious that any decision on this question is beset with difficulties. The view at which I have arrived is one which preserves the existing fabric of the laws, leaving these laws to be repealed or altered by the Oireachtas after mature consideration. The contrary view would have far-reaching effects in many directions. I have, however, arrived at my view solely by an interpretation of Article 73, as shown by Article 83 to be the language of Dáil Éireann reiterated by the British Parliament, each authority acting independently, and binding alone those subjects which each authority has, under international law and practice, power to bind.

It it unnecessary, in my view of the case, to consider whether prohibition is the proper remedy. The applications for the writs of prohibition should be refused.

R. R.

The prosecutor, W. J. Alexander, Secretary of the Alexander Shipping Co., Ltd., appealed to the Supreme Court (1).

Serjeant Hanna K.C. and *Sainsbury,* for the appellant:—We submit, 1, that the Irish Free State, after its establishment on December 6th, 1921, when the Articles of Agreement for a Treaty between Great Britain and Ireland were signed, or on March 31st, 1922, when the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), was passed, became a separate and an independent entity so far as legislation is concerned; and is now in the same position as a foreign country, and accordingly the Irish Free State Courts have no more right to issue a process against a British company than they have to issue a process against a foreign country. 2, Liberty to issue the writ of prohibition should be granted, because the contract of service made between the deceased seaman and the owners of the ship was made in England, and the law to be applied is not Irish, but English compensation law. 3, If the Circuit Court Judge applied foreign law and made an award under it, there is no procedure by which his award could be enforced.

(1) Before KENNEDY C.J., O'CONNOR and FITZGIBBON JJ.

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

Sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1906, applies the Act to seamen provided they are workmen within the meaning of the Act, and are members of the crew of "any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides, or has his principal place of business in the United Kingdom," subject to certain modifications. Rule 81 of the Consolidated Workmen's Compensation (Ir.) Rules, 1917 (Stat. R. & O. 1917, No. 529), which corresponds with Rule 88 of the English Rules, provides, by paragraph 2, that if the accident out of which the matter arises occurred at sea, any matter mentioned in paragraph 1 of the Rule may be done in the County Court, or by the Judge or the Clerk of the Peace of the County Court (i) in the division in which the ship shall be when the matter is to be done, or (ii) in the division comprising the port of registry of the ship; or (iii) in the division in which the workman or the dependants of the workman, or some, or one of them, resides or reside (1).

(1) Rule 81 of the Consolidated Workmen's Compensation (Ir.) Rules, 1917, is as follows:—

"*In what Court proceedings may be taken.*

"81. Any matter which under the Act or these rules is to be done in a County Court or by, to, or before the Judge or Clerk of the Peace of a County Court, may be done in the County Court or by, to, or before the Judge or Clerk of the Peace of the County Court hereinafter mentioned, viz.:—

(1) (i) the Court in the division of the county in which all the parties concerned reside or carry on business; or

(ii) if the parties concerned reside or carry on business in different divisions,

(*a*) the Court in the division in which the accident out of which the matter arises occurred, or, in the case of any such workman as in paragraph 1 of Rule 36 mentioned, the Court in the division in which the workman was last employed in the employment to the nature of which the disease was due; or

(*b*) the Court in the division in which the party or one of the parties against whom relief is sought resides or carries on business at the time when the matter is to be done.

(2) If the accident out of which the matter arises occurred at sea, any such matter as in paragraph 1 of this rule mentioned may, without prejudice to the preceding provisions of this rule, be done in the County Court, or by, to, or before the Judge or the Clerk of the Peace of the County Court

(i) in the division in which the ship shall be when the matter is to be done; or

(ii) in the division comprising the port of registry of the ship; or

(iii) in the division in which the workman or the dependants of the workman by whom or on whose behalf the matter is to be done, or some or one of them, resides or reside.

Detention of Ships.

(3) An application for an order for the detention of a ship may, subject to the provisions of the rules for the time being in force under the Shipowners' Negligence (Remedies) Act, 1905, be made to the Judge of any Court.

(4) [*Proceedings against persons giving security.*]"

By Rule 14 service could have been effected out of the jurisdiction (1).

Under the law as it stood prior to the change made by and in pursuance of the Articles of Agreement for a Treaty an application for compensation like that in this case could have been brought in the County Court of Cork. But both for legislative and administrative purposes the "United Kingdom" referred to in the Workmen's Compensation Act, 1906, has ceased to be the unit. The Articles of Agreement for a Treaty conferred the status of a Dominion upon the Irish Free State. As a Dominion, it is an absolutely free and independent country, holding the same relation to Great Britain and Northern Ireland as to a foreign country. The force of law was given to the Articles of Agreement by the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4). And on December 5th, 1922, the Irish Free State Constitution Act, 1922 (Session 2) (13 Geo. 5, c. 1), was passed; and Article 2 of the "Constituent Act" set out in the Schedule to that Act provides that the Constitution shall be construed with reference to the Articles of Agreement for a Treaty. The Adaptation of Enactments Act, 1922 (No. 2 of 1922), and the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (Stat. R. & O. 1923, No. 405), provide for the construction of the expression, "the United Kingdom," in any enactment passed prior to the establishment of the Irish Free State, having regard to the exclusion of that State from the United Kingdom.

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(1) Rule 14 is as follows:—

"Service on Respondents.

"14. (1) The copies mentioned in the last preceding rule shall be served—

(*a*) by a Civil Bill officer;

(*b*) by the applicant or someone on his behalf; or

(*c*) by the applicant's solicitor or a solicitor acting as agent for such solicitor, or some person in the employment of either of them.

(2) Service may be effected either in accordance with the rules as to service of ordinary civil bills or by registered post in accordance with the provisions of sub-sections 3 and 4 of section 2 of the Act with reference to service of notice in respect of an injury.

Service by post.

(3) Where a document is served by post it shall, unless the contrary be proved, be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such document it shall be sufficient to prove that the same was properly addressed and registered.

Service on Respondent in Scotland or England.

(4) Where the accident occurred in Ireland, and any respondent resides in Scotland or England, service on such respondent may be effected in accordance with this rule, and service so effected shall be deemed to be sufficient."

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

A Dominion can legislate only for its own territory and its own nationals; and its Courts can exercise no wider jurisdiction than its Legislature: *Yelverton* v. *Yelverton* (1); *Firebrace* v. *Firebrace* (2); *Panagotis* v. *Owners of s.s. "Pontiac"* (3); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (4); *Lloyd* v. *Guibert* (5); *"The Halley"* (6); *Macleod* v. *Attorney-General for New South Wales* (7); *"The City of Agra"* (8); *British South Africa Co.* v. *Companhia de Moçambique* (9); *John Russell & Co., Ltd.*, v. *Cayzer, Irvine, & Co., Ltd.* (10); *Attorney-General for Canada* v. *Cain and Gilhula* (11).

The circumstances in which judgments of a foreign Court will be enforced are stated in *Rousillon* v. *Rousillon* (12) by Fry J., at p. 371, as follows:—"The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained; and, possibly, if *Becquet* v. *MacCarthy* (13) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." None of these conditions exists in this case.

[KENNEDY C.J.: Article 73 of the Constitution provides that "the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same, or any of them, shall have been repealed or amended by enactment of the Oireachtas." It seems to me that the Courts of Justice Act, 1924, sect. 51, is a repeal or amendment by enactment of the Oireachtas within the meaning of Article 73 of the laws in force at the date of the coming into operation of the Constitution (14).]

If sect. 51 is an amendment, it destroys, in such cases as the present, the operation of Article 73 of the Constitution, as laid down in *R.* (*Armstrong*) v. *County Court Judge of Wicklow* (15), in which it was held that the County Court Judge had jurisdiction to entertain a request for arbitration lodged by a seaman resident in the Irish Free State, who was injured in Jamaica, on board a British ship owned by English shipowners, having their registered office in London. We contend that that decision has no application to the circumstances existing in the present case. As the law stood at the time of that decision, the

(1) 1 S. & T. 574.
(2) L.R. 4 Prob. D. 63.
(3) [1912] 1 K. B. 74.
(4) [1894] A. C. 670.
(5) L.R. 1 Q.B. 115.
(6) 2 Privy Council App. 193.
(7) [1891] A. C. 455.
(8) (1898) Prob. 198.
(9) [1893] A. C. 602.
(10) [1916] 2 A. C. 298.
(11) 22 T. L. R. 757.
(12) 14 Ch. Div. 351.
(13) 2 B. & Ad. 951.
(14) Sect. 51 is set out *ante*, p. 167, note.
(15) [1924] 2 I. R. 139.

County Court Judge appointed under the laws enacted by the Parliament of the former United Kingdom would have heard the request for arbitration, but now such a request must be heard by a Judge of the Circuit Court—a Court constituted in pursuance of the Courts of Justice Act, 1924. That is to say, the case must be heard by a Judge of the Circuit Court, deriving his authority from an Act passed by the Oireachtas. But the Oireachtas cannot legislate extra-territorially; and even if that power had been given by Art. 73 of the Constitution, the Courts of Justice Act, 1924, is an amendment of the laws in force at the date of the coming into operation of the Constitution in 1922 so far as this case is concerned.

Costello K.C. and *Bewley*, for the respondent, the Circuit Judge:—It should not be assumed that the Irish Free State, as a member of the British Commonwealth of Nations, has no power to legislate extra-territorially. The British Parliament is under no limitation not to enact laws relating to foreigners; nor are the legislatures of the Dominions under any limitation not to pass extra-territorial legislation. Mere difficulty in executing the decrees of the Court giving effect to such legislation is no reason why the Courts should say that the legislation is invalid: *"The Wild Ranger"* (1); *Niboyet* v. *Niboyet* (2); *Colquhoun* v. *Brooks* (3); *Harding* v. *Commissioners of Land Tax* (4); *Mortensen* v. *Peters* (5); Pitt Cobbett's Leading Cases on International Law, 4th ed., vol. i, pp. 227–8.

The question what jurisdiction can be exercised by the Courts of any country according to its municipal law cannot be conclusively determined by a reference to international law: *British South Africa Co.* v. *Companhia de Moçambique* (6). Once an Act is placed on the Statute Book the Courts must administer it, irrespective of whether or not it contravenes international law. Even if the Workmen's Compensation Act could not be enforced against foreigners, that fact is immaterial in this case, because all the parties are British subjects: *R.* (*Coleman*) v. *Pettit* (7). The argument that a foreigner is not entitled to the benefit of domestic legislation is not sound, and no such distinction is expressed or implied in the Workmen's Compensation Act, 1906: *Krzus* v. *Crow's Nest Pass Coal Co., Ltd.* (8). An Act of the Oireachtas is not necessarily *ultra vires* if it be extra-territorial, as the State has power to legislate over all matters affecting the peace, order, and good government of the country: *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (9); *Ashbury* v. *Ellis* (10); *Bank of Australasia* v. *Nias* (11); *Macleod* v. *Attorney-General for New South Wales* (12).

(1) 32 L. J. Adm. 49.
(2) L. R. 4 Prob. D. 1.
(3) 59 L. J. Q. B. 53.
(4) [1891] A. C. 446.
(5) 8 Fraser [Ct. of Just.], 93.
(6) [1893] A. C. 602, at p. 624.
(7) [1902] 2 I. R. 1.
(8) [1912] A. C. 590.
(9) [1903] A. C. 471.
(10) [1893] A. C. 339.
(11) 20 L. J. Q. B. 284.
(12) [1891] A. C. 455.

Supreme Court. 1925.

R. (ALEXANDER) *v.* CIRCUIT JUDGE FOR CORK.

The right to sue a British national arises by virtue of Art. 73 of the Constitution. Two sovereign legislatures have each bound its own nationals to the same laws by conjoint legislation. Both authorities re-enacted over their respective subjects the law which formerly prevailed when a common authority existed.

Ernest Robinson, for the claimant, Ellen Allen:—The prosecutor has mistaken his remedy, as prohibition does not lie to a Judge of the Circuit Court when sitting and adjudicating under the Workmen's Compensation Act, 1906: *Turner* v. *Kingsbury Collieries, Ltd.* (1).

Serjeant Hanna K.C., in reply.

Cur. adv. vult.

April 29.

KENNEDY C.J.:—

This is an appeal from an order of the High Court of Justice made on the 19th December, 1924, refusing the appellant's application for an order for a writ of prohibition, prohibiting the Circuit Judge for Cork from hearing, entertaining, or proceeding with an application for arbitration under the Workmen's Compensation Act, 1906, wherein Ellen Allen, of Kinsale, was the applicant and Messrs. Capper, Alexander, & Co., the owners of the ship "Malmesbury," were respondents. The prosecutor, who is the present appellant, was Mr. Waldemar Joseph Alexander, Secretary of the Alexander Shipping Company, who moved on behalf of the said Company. The appellant applied in the first instance to the High Court *ex parte*, but was directed to serve notice of the application. The order was made on the hearing, upon such notice having been served. The notice stated that the grounds of the application were "that the said Circuit Judge has no jurisdiction to hear or entertain the said arbitration proceedings." The Circuit Judge and the said Ellen Allen were represented by counsel on the hearing before the High Court, and they have both appeared as respondents on the hearing of this appeal. The facts of the case are shortly as follows:—Michael Allen was a seaman serving on the s.s. "Malmesbury" on the 27th April, 1924, when, while engaged in repairing a ventilator on the deck of the ship, he was washed overboard and drowned. The ship was then on a voyage from Rotterdam to Cagliari. She was a British ship, registered as such at the port of London, and had never been at any time within the territorial jurisdiction or limits of the Irish Free State. She was owned by the Alexander Shipping Company, whose managers are Messrs. Capper, Alexander, & Co. who, as well as the Alexander Shipping Company, have their office at 4 St. Mary Axe, London, E.C. The said owners of the vessel are not within the territorial jurisdiction of the Courts of the Irish Free State, nor have

(1) [1921] 3 K. B. 169.

they any office registered, nor place of business, nor agent in the Irish Free State.

The seaman, the said Michael Allen, deceased, joined the s.s. "Malmesbury" as a boatswain at Cardiff on the 23rd of February, 1924, and it was during the contract of service then entered into that the alleged accident took place. It is not disputed that the contract of service between the owners of the vessel and Michael Allen was entered into at Cardiff, in Glamorganshire, Wales, and therefore outside the territorial jurisdiction of the Irish Free State.

Ellen Allen, who is the mother of the said Michael Allen, and as one of his dependants claims compensation by reason of his death, resides at 19 Main Street, Kinsale, in the County of Cork. On the 1st day of August, 1924, a request for arbitration under the Workmen's Compensation Act, 1906, was delivered by post to the Secretary of the Alexander Shipping Company, Ltd. The applicant named in the document was the said Ellen Allen and the respondents, Messrs. Capper, Alexander, & Co., as owners of the s.s. "Malmesbury." The document so delivered laid the arbitration proceedings in the County Court of Cork, East Riding, Division of Cork, and stated that the matter would be heard by the Judge at the next Court of competent jurisdiction at the Sessions to be held at the Court-house in Cork for the Division of Cork, on the 9th October, 1924. The owners of the ship did not submit to the jurisdiction, but moved for an order for a writ of prohibition upon an affidavit setting out these facts. The facts, as I have stated them, are not disputed in any particular.

The liability to pay compensation for personal injuries by accident arising out of and in the course of employment was first created in respect of injuries caused to seamen by sect. 7 of the Workmen's Compensation Act, 1906, which is a statute of the former United Kingdom. The application of the Act to seamen is subject to the proviso that such seamen are workmen within the meaning of the Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom; and it will be remembered that a workman under that Act means a person who has entered into or works under a contract of service with an employer.

When any question arises as to the liability to pay compensation under the Act, the question is required to be settled by arbitration in accordance with the Second Schedule to the Act, if not settled by agreement. In the absence of agreement, the Second Schedule provides that the matter shall be settled by the Judge of the County Court, according to the procedure prescribed by Rules of Court; and, by Article 11 of that Schedule, it is provided that where any matter under

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

Kennedy C.J.

the Act is to be done in a County Court and the parties reside in different districts, the matter shall be done by the Judge of the County Court of the district prescribed by Rules of Court.

Rule 81 of the Consolidated Workmen's Compensation (Ireland) Rules of 1917 (which corresponds with Rule 88 of the English Rules), prescribes the Court in which proceedings under the Workmen's Compensation Act, 1906, may be taken.

In the case of a matter arising out of an accident at sea, it provides that any matter which under the Act or the Rules is to be done in a County Court, or by, to, or before the Judge or Clerk of the Peace of a County Court, may be done in the County Court or by, to, or before the Judge or the Clerk of the Peace of the County Court (i) in the division in which the ship shall be when the matter is to be done; or (ii) in the division comprising the port of registry of the ship; or (iii) in the division in which the workman, or the dependants of the workman, by whom or on whose behalf the matter is to be done, or some or one of them, resides or reside.

The request for arbitration brought by Ellen Allen is based upon the assumption that it comes within the third of these cases, and consequently that, by virtue of the rule, she can require an arbitration, with reference to the compensation payable to her by reason of her son's death, to be had in the East Riding of the County of Cork.

Rule 14 of the Irish Rules, to which I have just referred (corresponding with Rule 16 of the English Rules), enables service out of the jurisdiction to be effected, as was purported to be done in the present case, by registered post.

If the present case had happened while that state of the law and practice relating to workmen's compensation remained undisturbed, it is not denied that the shipowners would have been amenable to the jurisdiction of the County Court Judge of Cork (East Riding), as arbitrator under the Act, if Mrs. Allen had elected to adopt the procedure which she has now sought to use: *Rex* v. *Owen* (1). The question which we have to determine is whether the constitutional and legal changes, consequent upon the events of the past few years, have deprived her of the benefit of the former procedure.

The Workmen's Compensation Act, 1906, was an enactment of the Parliament of the then United Kingdom legislating for Ireland and Great Britain as a single constitutional unit, though with separate judiciaries, each such judiciary having its separate territorial jurisdiction. From the point of view of the British legislature, there was nothing offensive to constitutional principle in making a person, wherever domiciled or resident within the area of the constitutional unit, answerable to the jurisdiction of any of the separate judiciaries. So the English owners of a ship registered in an English port could be required by law

(1) [1902] 2 K. B. 436.

to pay the compensation awarded by an Irish County Court in respect of the death of a seaman whose contract of service was made in England and whose death occurred through accident in an English port, if his claimant dependants resided in Ireland.

The constitutional unity has been severed. By the Treaty of 1921 made between Ireland and Great Britain, it was agreed that Ireland should have the same constitutional status as the four great Dominions in the British Commonwealth of Nations, and that, subject to the other provisions of the Treaty, her position in relation to the Imperial Parliament and Government and otherwise should be that of the Dominion of Canada. Dáil Éireann thereupon proceeded to enact a Constitution giving effect to the terms of the Treaty. The Constitution so enacted by the Dáil was recognised by the British Parliament, and by the statute called the Irish Free State Constitution Act, 1922 (Session 2), it was made binding upon all who were subject to the authority of that Parliament.

Article 73 of the Constitution provided as follows:—"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." This Article is the pivot of the argument in the present case.

Article 64 of the Constitution provided that "the judicial power of the Irish Free State should be exercised and justice administered in the public Courts established by the Oireachtas by Judges appointed in manner hereinafter provided." The succeeding Articles outline the judicial organisation to which effect has now been given by the Courts of Justice Act, 1924 (No. 10 of 1924), under which the Courts now sitting throughout the State came into existence. That Act was passed on the 12th April, 1924, and contained a provision enabling it to be brought into operation by Order of the Executive Council on different dates for different purposes. Part II of the Act, creating the Circuit Court, was in this way brought into operation on the 6th August, 1924. The respondent, Judge H. D. Conner, was appointed under the Act a Judge of the Circuit Court for the Circuit comprising the East Riding of the County of Cork.

Article 75 of the Constitution provided that until Courts should be established in accordance with the Constitution, the Courts then existing, including County Courts, should for the time being continue to exercise the same jurisdiction as theretofore. It was held by the late Court of Appeal, in a case in which the parties were somewhat similarly circumstanced to the present case, that the effect of Articles 73 and 75 was to preserve the position of British shipowners in relation to claims under

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

Kennedy C.J.

the Workmen's Compensation Act, 1906, by seamen and their dependants, so long as the County Courts continued in existence: *R.* (*Armstrong*) v. *County Court Judge of Wicklow* (1). The Master of the Rolls, who was a member of the Court, upon consideration of his judgment, expressed his disagreement with this view.

The County Courts have now ceased to exist. By sect. 51 of the Courts of Justice Act, 1924, there has been transferred to the Circuit Court thereby created all the jurisdiction then vested in or capable of being exercised by County Court Judges and Recorders. We have recently decided that this section has the effect of transferring to the Circuit Court the jurisdiction of the County Court Judge as arbitrator under the Workmen's Compensation Act, 1906: *Lynch* v. *Limerick County Council* (2). We decided in the same case that, in lieu of the appeal to the Court of Appeal under Article 4 of the Second Schedule to the Workmen's Compensation Act, 1906, an appeal now lies from the Circuit Court to two Judges of the High Court under sect. 61 of the Courts of Justice Act, 1924, with a further appeal, in the event of their disagreement, to this Court. The appeal as of right to the House of Lords given by Article 18 of the Second Schedule to the Workmen's Compensation Act, 1906, has ceased to lie since the Treaty of 1921 became effective. It was definitely abolished by Articles 66 and 75 of the Constitution.

Mr. Serjeant Hanna, in support of his application for a writ of prohibition, has addressed to us a learned and exhaustive argument on the question of extra-territorial legislation by a Dominion member of the British Commonwealth of Nations. To which Mr. Costello, for the Circuit Judge, has replied that, if the Oireachtas enacted such legislation, it should be enforced by the Courts, even though it were a contravention of international law.

Mr. Costello, however, in his very able and ingenious argument, takes his real stand on a different position. He contends that there is no question here of extra-territorial legislation, because there are two sovereign legislatures, each binding its own nationals to obedience to the same laws. This, he says, is the effect of both Parliaments having given legislative effect to Article 73 of the Constitution. He further says that it was in contemplation of both that the law so preserved in force would be administered by new Courts to be set up under the Constitution. He argues that we have here the equivalent of express reciprocal legislation by both Parliaments, giving the Circuit Judge jurisdiction to hear the claim and make an award against the English shipowner.

Now, the Workmen's Compensation Act is primarily an Act imposing a liability; Mr. Costello suggests that it creates a compulsory insurance. If he is right, we have here a liability to pay compensation or an obligation to insure arising out of a

(1) [1924] 2 I. R. 139. (2) [1925] 2 I. R. 61.

contract made outside the jurisdiction, and to be wholly performed outside the jurisdiction, incumbent on a person resident outside the jurisdiction (not being a citizen or national of the Saorstát), and giving rise to a claim in events necessarily happening outside the jurisdiction of the Parliament and Courts of the Saorstát—I refer, of course, to territorial jurisdiction. If specific legislation of such a kind were passed (without reciprocal enactment by the Parliament within whose territorial sovereignty were the persons attempted to be bound), it would *primâ facie* offend against the conventions of international law by impinging upon the exclusive sovereignty and jurisdiction of another State within its own limits; but I reserve until the occasion arises (if it ever should) consideration of the question whether this Court could, or should, interfere with the attempt to administer such a law or pronounce upon its validity. We are not, however, in the present case, considering specific legislation of this kind, expressly dealing with the matter in controversy. We are considering an enactment in general terms—Article 73 of the Constitution—and we are asked to hold that it has the effect of such specific enactment with reciprocal legislation to be implied from the facts and circumstances. The whole case, in fact, hinges on the true construction of Article 73. Now, in the first place, it is to be remembered that "the Constituent Act" was in the first instance drawn up and enacted by Dáil Éireann. The task in hand was the passing of a Constitution as an instrument of government of the people of the Saorstát. There is nothing in it to indicate an intention to impose obligations on persons outside its own sovereignty. Indeed, this is admitted, for the argument is that the Act in question was imposed only on the people of the Saorstát by Article 73, and that it fell upon the people of Britain by implied reciprocal enactment of the British Parliament in the Irish Free State Constitution Act, 1922 (Session 2).

Here let me turn to the actual terms of Article 73, and let me say that, after some doubt, I have, upon consideration, come to agree respectfully with the judgment of the Master of the Rolls in *Armstrong's Case* (1) with regard to the importance of the words, "in force in the Irish Free State." I have come to the conclusion that the true meaning of the Article is that laws which are in force in the Saorstát, and to the extent to which they are in force in the Saorstát, are to continue of full force and effect in the Saorstát to the extent to which they are not repealed or amended by the Oireachtas. As I understand it, the very able argument which has been addressed to us by Mr. Costello accepts and proceeds on this basis.

But then comes the critical stage of the argument, when we are of necessity invited to imply in the British legislation reciprocal enactment binding the nationals of Great Britain. I have carefully examined the British Act. In my opinion it

(1) [1924] 2 I. R. 139.

Supreme Court. 1925.

R. (ALEXANDER) *v.* CIRCUIT JUDGE FOR CORK.

Kennedy C.J.

takes the Constitution as we passed it and says—there is the Constitution these people of the Free State have passed for themselves; so far as our people are concerned, be it so. It adds nothing to it. It in nowise extends, or purports to extend, its effect. Moreover, it is only as a Constitution implementing what the Treaty had done that it receives British legislative recognition—not as legislation comprehending the general laws in their incidence on British nationals.

In my opinion, therefore, the contention that there has been reciprocal legislation by the conjoint effect of "the Constituent Act" of Dáil Éireann and of the Irish Free State Constitution Act, 1922 (Session 2), of the British Parliament, re-enacting the law and practice of the Workmen's Compensation Act, as it was before the Treaty, throughout the area of the former United Kingdom, cannot stand. Indeed, I believe, if we were so to hold, the principle established would have unexpected and startling results when applied to other Acts formerly in force throughout Great Britain and Ireland. In my opinion, there must be express reciprocal legislation founded on convention or agreement to give effective jurisdiction in such a case as the present.

I am of opinion, therefore, that the Circuit Court has no jurisdiction to entertain Mrs. Allen's application for arbitration.

There remains the question whether prohibition should be granted. Mr. Robinson, for Mrs. Allen, relies on *Turner* v. *Kingsbury Collieries, Ltd.* (1), in which case M'Cardie J. refused to issue prohibition to a County Court Judge on the ground that the Judge was only an arbitrator for the purpose of the Workmen's Compensation Act. The Courts of Justice Act has, however, transferred the jurisdiction of the arbitrator to a Court—the Circuit Court of Justice—and the objection does not apply.

Further, it is to be observed that if the matter had proceeded to a hearing before the Circuit Court, and the question of the validity of the law had been raised, as Mr. Serjeant Hanna has raised it on the present motion, the Circuit Judge would have found himself confronted by Article 65 of the Constitution, reserving original jurisdiction in such matters to the High Court. In these circumstances the application for a writ of prohibition was, in my opinion, an apt as well as a convenient proceeding.

In my opinion the order of the High Court should be reversed, and the application of the appellant for a writ of prohibition should be granted. I think the appeal should be allowed, with costs here and in the High Court, to be paid by the Circuit Judge, who will, I assume, be indemnified by the State.

O'CONNOR J.:—I concur.

(1) [1921] 3 K. B. 169.

FITZGIBBON J. :—The question to be decided upon this appeal is whether the Circuit Judge for Cork has jurisdiction to entertain a request for arbitration under the Workmen's Compensation Act, 1906, issued at the suit of Ellen Allen, who resides at Main Street, Kinsale, within the district of the said Judge, claiming compensation as a dependant upon her son, Michael Allen, who was drowned at sea on the 27th of April, 1924, while serving upon the s.s. "Malmesbury," in the course of a voyage from Rotterdam to Cagliari, in Sardinia.

The following facts have been proved or admitted:—The s.s. "Malmesbury" is a British ship, registered in the Port of London, and was not at any material time within the territorial limits of the Irish Free State. The said ship is owned by the Alexander Shipping Co., Ltd., an English company, incorporated under the Companies Acts, having its registered office in London, and having no place of business or agent in the Irish Free State. The managers are Messrs. Capper, Alexander, & Company, of 4 St. Mary Axe, London. The contract of service during which the accident which caused the death of Michael Allen occurred was entered into between Michael Allen and the shipowners at Cardiff, in Wales. The accident which caused the death of Michael Allen occurred at sea, outside the territorial waters of Great Britain or the Irish Free State.

In these circumstances Ellen Allen filed with the Registrar of the District Court for the East Riding of Cork a request for arbitration, intituled "In the Matter of the Workmen's Compensation Act, 1906, and in the Matter of an Arbitration between Ellen Allen, applicant, and Capper, Alexander, & Company, owners of the s.s. 'Malmesbury,' respondents." Notice of the arbitration was sent by post in a registered letter addressed to the persons named as respondents at their registered address, and was duly delivered. Upon the 2nd of September, 1924, counsel on behalf of Mr. W. J. Alexander, Secretary of the Alexander Shipping Company, applied *ex parte* to Mr. Justice Murnaghan for a writ of prohibition directed to the Circuit Judge for Cork to restrain the Judge from hearing, entertaining, or proceeding with the application for arbitration, upon the ground that the Judge had no jurisdiction to hear or entertain the said arbitration proceedings. Thereupon Mr. Justice Murnaghan made an order giving the prosecutor liberty to serve notice for the second day of the ensuing sittings of an application for a conditional order for a writ of prohibition. The motion was heard on Monday, November 24, 1924; and on December 19 Mr. Justice Murnaghan delivered a considered judgment refusing the application. From that order an appeal to this Court was taken by the prosecutor. He contends that the Courts of the Irish Free State have no power to issue process against parties who reside outside the territorial limits of the Free State, except, possibly, in respect of contracts entered into, or broken, or to be performed in the Free State, or lands situate therein, and that

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

FitzGibbon J.

the Oireachtas has no power to enact a law, or to sanction a rule of Court, the effect of which would be to enable a British subject or a foreigner to be impleaded in our Courts, except, possibly, in cases of the class I have described, or where he was served with the process while actually commorant in the Free State; and the prosecutor calls upon us to pronounce any such law or rule invalid.

Before the Irish Free State came into existence it had been decided under the earlier Compensation Act, in the case of *R.* v. *Owen* (1), that the Judge of the County Court in England within whose district an accident occurred had jurisdiction to hear an application against a respondent employer who resided in Scotland, and since that decision it has been generally assumed that the forum of the district in which the accident occurred was competent, irrespective of the portion of the then United Kingdom in which the respondent resided. Clause 11 of the Second Schedule of the Act provided that "Where any matter under this Act is to be done in a County Court, or by, to, or before the Judge or registrar of a County Court, then, unless the contrary intention appear, the same shall, subject to rules of Court, be done in, or by, to, or before the Judge or registrar of the County Court of the district in which all the parties concerned reside, or if they reside in different districts the district prescribed by rules of Court, without prejudice to any transfer in manner provided by rules of Court."

Pursuant to that clause, rules were made, and Rule 88 (English) corresponds with Rule 81 (Irish) (2), which provided as follows:—[Reads Rule 81]. Service of notices was provided for by Rule 16 (English), corresponding with Rule 14 (Irish) (3), and by sub-sects. 3 and 4 of sect. 2 of the Act (4). [Reads Rule 14 and sect. 2, sub-sects. 2 and 3.] Thus there was created a complete code, binding all subjects in the United Kingdom; and there appears to be no doubt that before the Irish Free State came into existence the jurisdiction of the County Court Judge of the East Riding to entertain this case was not open to question. The jurisdiction of the Circuit Court is alleged by the respondents to exist as follows:—Unquestionably, under the law in force in Ireland before the Free State came into existence the County Court Judge of Cork would have had power to entertain this case. Article 73 of the Constitution enacted as

(1) [1902] 2 K.B. 436.

(2) Rule 81 is set out *ante*, p. 176, note.

(3) Rule 14 is set out *ante*, p. 177, note.

(4) Sect. 2, sub-sect. 3—"The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served."

Sub-sect. 4—"Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body."

follows:—[Reads Art. 73]. Article 75 provided as follows:—[Reads Art. 75]. The Constitution was given the force of law in Great Britain by the Irish Free State Constitution Act, 1922 (Session 2), and finally by Order in Council, dated April 1, 1922 (1), it was provided (clause 13) that: "Subject to any Act of the Provisional Parliament and to the provisions of this Order and any other Order made under the Irish Free State (Agreement) Act, 1922, all existing laws, institutions and authorities in Southern Ireland, whether judicial, administrative or ministerial, shall continue as if this Order had not been made, subject to the modifications necessary for adapting them to this Order, and in particular to the modifications hereinafter set forth." And in my opinion the combined effect of these enactments is correctly stated in the judgment of Murnaghan J. and in the decision of the late Court of Appeal in the case of *R.* (*Armstrong*) v. *County Court Judge of Wicklow* (2).

The next step is from the County Court to the Circuit Court, and it is here that, in my opinion, the difficulty arises. In exercise of its powers under the Constitution, the Oireachtas proceeded by the Courts of Justice Act to constitute new Courts in substitution for those which had previously existed, and, among them, the Circuit Court was created by sect. 37. Sect. 51 transferred to the Circuit Court "all jurisdiction not hereinbefore expressly excepted which, at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions, or any of the same in Saorstát Éireann (save such jurisdiction of Justices at or of Courts of Quarter Sessions as is hereinafter conferred on or transferred to the District Court)"—and that this includes, so far as this country is concerned, the jurisdiction under the Workmen's Compensation Act has been already decided by this Court (3). Therefore, so far as the Irish Free State is concerned, the Circuit Court has all the powers possessed by the former County Courts. But the jurisdiction of the County Court Judges as statutory arbitrators over English and Scottish residents was originally conferred, and, after the creation of the Irish Free State, was preserved, by Imperial Acts binding upon all inhabitants of England, Scotland, and Northern Ireland; and, so long as the late County Courts existed, such authority as they had enjoyed over Englishmen and Scotsmen remained unaltered. When the Oireachtas abolished the County Courts and set up a Circuit Court instead of them, it became impossible, in my opinion, any longer to contend that English or Scottish residents were amenable to that Court by virtue of any enactment of the Imperial Parliament binding upon them. The jurisdiction of that Court was conferred only by the Oireachtas, and

(1) The Provisional Government (Transfer of Functions) Order, 1922 (Stat. R. & O. 1922, No. 315).

(2) [1924] 2 I. R. 139.

(3) [1925] 2 I. R. 61.

Supreme Court. 1925.

R. (Alexander) v. Circuit Judge for Cork.

FitzGibbon J.

whether such jurisdiction over persons not subject to or commorant in the Irish Free State has been conferred, and, if so, the extent and validity of it, must be decided upon general principles.

Upon this branch of the case Serjeant Hanna has relied upon a number of cases in which the power of the Courts of one country to affect the subjects of another has been considered. But the question for us is whether this legislation is valid in this country, not whether the Courts of another country would enforce our decisions. To allow the Courts of another country to decide whether our laws were valid here would be to accord to them that very power of laying down the law *extra territorium*, which has been so strongly deprecated by the appellants' counsel. There was a recent illustration of this in the High Court of Australia in the case of *Delany* v. *G. W. Milling Co.* (1), where the appellant was a Victorian and the respondents were a New South Wales company. The appellant had bought wheat in New South Wales. He assigned his contract to the respondents, who paid him £150 on account. A New South Wales Act was passed *ex post facto* annulling the contract, and the appellant was sued for money had and received. Judgment was given against him in New South Wales. The High Court of Australia, by a majority, decided that the New South Wales Act was *intra vires*, "and none the less so because it affects people outside New South Wales."

Serjeant Hanna, on behalf of the prosecutor, contends that the setting up of the Irish Free State as a separate self-governing entity has altered the position, and that our Courts have no longer jurisdiction to entertain applications for arbitration against English, Scottish, or Northern Ireland employers. He also alleges a number of other grounds as defeating the jurisdiction of our Courts. Some of these are scarcely worthy of serious attention, but as they have been vigorously pressed, I shall endeavour to dispose of them as briefly as possible.

He says that the case must be decided in accordance with the *lex loci contractus*, and that that law would be English law, and that the Circuit Judge is not competent to administer English law. Why not? In any case of a foreign contract or a foreign charter-party a Circuit or County Court Judge might have to ascertain the law of a foreign country; but I never heard it suggested until the present case that the possible difficulty in doing so was a ground for prohibiting him from entertaining the case.

Then the Serjeant contends that the Workmen's Compensation Act is an English Act, and that foreigners, amongst whom he includes Ellen Allen, are not entitled to the benefits of British domestic legislation. Unfortunately for this argument, the direct contrary was decided by the Privy Council in *Krzus* v. *Crow's Nest Coal Pass Co.* (2), where a non-resident alien

(1) 22 C.L.R. 150.

(2) [1912] A.C. 590.

dependant of an alien workman was held to be entitled to compensation under the corresponding British Columbian statute; and in *Davidsson* v. *Hill* (1) the dependants of a Norwegian sailor, who had been killed on the high seas, were held to be entitled to maintain proceedings against his employers under the Fatal Accidents Act.

The possibility that the award may prove to be unenforceable would be a ground on which a Court might, in its discretion, refuse to entertain a case, or to give leave to issue its process for service out of the jurisdiction, but cannot be a ground for prohibition; and in the case of a foreign ship there are means actually provided under sect. 11 for enforcing an award recovered against a foreign ship by a workman injured by accident while employed upon her. Sect. 7 of the Act deals with masters, seamen, and apprentices, and is confined to British ships; but sect. 11 is not so restricted in its operation, and under it, apparently, a workman, other than a master, seaman, or apprentice, if injured in the course of his employment on a foreign ship, might recover compensation from her owners provided he was able to catch the vessel in British territorial waters.

But I am of opinion that, since the abolition of County Court Judges, who were statutory arbitrators under the Workmen's Compensation Act, and whose jurisdiction as such over all residents in those portions of the late United Kingdom which lie outside the Irish Free State was, according to *Armstrong's Case* (2), preserved by the ratification in England of Clause 75 of the Constitution, there is now no English law in force which makes an English resident amenable to the Circuit Court in respect of a claim such as the present.

Then the question arises whether the Oireachtas can, either by direct legislation or by the adoption of Rules of Court, make residents in other countries amenable to our Courts in the absence of submission, express or implied, to the jurisdiction of the Courts of the Free State, or where the subject-matter of the litigation is not in some way connected with this country. The maxim, *actor sequitur forum rei,* is by no means of universal application, and the Oireachtas has, not only under the Constitution, but inherently, power to make all such laws as are necessary for the peace, order, and good government of Saorstát Éireann. I regret that the duty has been imposed upon us of deciding whether a law passed by the Oireachtas, which it no doubt considered essential, is really so, and that a Court of Justice should have to determine a question which appears to me to be in the main a political or administrative one. The Oireachtas itself has, however, placed the responsibility upon us, and it seems to me that it arises in this case.

Believing, as I do, that the decision in *R.* (*Armstrong*) v. *County Court Judge of Wicklow* (2) was correct in the then state of the law, and finding that sect. 51 of the Courts of

(1) [1901] 2 K.B. 606. (2) [1924] 2 I.R. 139.

Supreme Court. 1925.

R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK.

FitzGibbon J.

Justice Act purports to transfer "to the Circuit Court all jurisdiction not hereinbefore expressly excepted which, at the commencement of this Act, was vested in or capable of being exercised by Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions," it follows that the Circuit Court Judge, if the latter enactment is effective, possesses jurisdiction to entertain the present case.

But by constitutional usage, and by the comity of nations and so-called international law, the Courts of one country do not, as a rule, exercise jurisdiction over the subjects or citizens of another except in cases of a class which is described by Order XI of the Rules made under the Judicature Act. I would be prepared to hold that in any case outside that class an enactment of the Oireachtas conferring upon the Courts of the Saorstát jurisdiction over foreigners was valid, provided I was satisfied that it was essential for the peace, order, and good government of the Saorstát. I am not satisfied that it is essential for those purposes that the Circuit Judge should have the jurisdiction claimed for him in the present case.

The Free State citizen is not without her remedy. She can prosecute her claim in England, either in the district in which the ship is to be found or in that in which it is registered, or in that in which its owners reside, and the award, if she succeeds in obtaining one, will be readily enforceable by the process of the Courts of the country in which it is granted.

I desire to make an observation upon an argument which has been strongly urged upon us by the appellant, with which I am unable to agree, and which has not influenced my decision. The maxim, *extra territorium jus dicenti impune non paretur*, has, in my opinion, been misapplied in the present case, and also, I think, with all respect, in *Macleod* v. *Attorney-General for New South Wales* (1), upon which Serjeant Hanna based the greater portion of his argument. The head-note of that case, as reported in the Law Reports, seems to me to state quite accurately what was actually decided, viz., that upon its true construction the statute of New South Wales which was under the consideration of the Judicial Committee was not intended to, and did not operate outside the Colony of New South Wales, so as to make an act forbidden by the statute a crime if committed outside the limits of the colony, even by a subject of the colony itself. Lord Halsbury, in stating the opinion of the Committee, after dealing with the question of construction, which decided the case in favour of the appellant, went on to add a further ground, based upon the maxim to which I have referred (2): "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been

(1) [1891] A. C. 455.

(2) [1891] A. C., at p. 458.

beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *extra territorium jus dicenti impune non paretur*, would be applicable to such a case." It is perfectly true that no Colonial legislature can make laws for a place beyond the territorial limits of the colony. But this rule applies with equal force to the Imperial Parliament itself. It cannot make laws which will be effective in a foreign country. But it can make laws for Great Britain with respect to foreign countries and to acts done in them. Earl Russell was convicted under an English statute of a crime indistinguishable in its circumstances from that of which Macleod was acquitted (1). If the rule upon which Lord Halsbury relied was of universal application as a matter of "international law," Earl Russell could not have been convicted of a crime committed outside British jurisdiction, and made criminal only by an English statute. If, on the other hand, the English statute was not a violation of the principles of international law, as stated in the maxim, neither was the statute of New South Wales, provided it was essential for the peace, order, and good government of that colony. But in my opinion the question is not one of private or public international law at all. We have to consider the validity in this country of the laws of this country, not the extent to which they may or may not be enforceable in some other country; and I am not to be taken as deciding in this case that an enactment of the Oireachtas, making it a crime for a married citizen of the Saorstát, or for a man who had married a wife in the Saorstát, to go through the form of marriage with another woman at Holyhead or across the border which separates us from Northern Ireland, could not be validly enforced against the offender if he were apprehended in this State. As at present advised, I am not prepared to hold that legislation in this country making it a crime for persons to conspire elsewhere against the peace, order, and good government of this country, or to defraud our Customs, or to violate our laws is necessarily invalid because of the secondary opinion of the Judicial Committee in *Macleod's Case* (2), nor that our Courts would not have full jurisdiction to deal with such offenders if they should happen to come within the limits of the Saorstát. The Free State would not, in the cases I have supposed, be enacting laws for places outside its limits, but would be enacting laws for itself with regard to persons or acts beyond its limits, and if these laws were essential to the peace, order, and good government of the Free State, I see no ground for doubting that they would be valid.

I had some doubt whether prohibition was the appropriate remedy, but after consideration I have come to the conclusion that, as we are all quite satisfied that the rule relied upon by

(1) *The Trial of Earl Russell* [1901] A. C. 446. (2) [1891] A. C. 455.

Supreme Court. 1925. R. (ALEXANDER) v. CIRCUIT JUDGE FOR CORK. FitzGibbon J.

the applicant for compensation as giving jurisdiction to the Circuit Court is invalid, there is no more adequate method of dealing with the case, especially as under the Constitution (1) the High Court alone has original jurisdiction when the validity of any law is called in question.

Solicitors for appellant: *Norris Goddard & Davidson.*
Solicitor for respondent: *The State Solicitor.*
Solicitor for Ellen Allen: *Wm. F. O'Connor.*

R.L.S.

(1) Art. 65.

EUGENE KENNEDY, APPLICANT; THE MINISTER FOR FINANCE, RESPONDENT (1).

Supreme Court. 1925.

June 5, 8. July 29.

Malicious injury — Claim for compensation — Meadow grass cut and taken away — Injury to lands — Malice — Consequential damage — Larceny — Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *subsect.* 1—*Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *sect.* 51—*Damage to Property (Compensation) Act*, 1923 (*No.* 15 *of* 1923), *sect.* 6.

The Supreme Court *held* that sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), forbids the awarding of compensation for "consequential loss," both of the type appearing in *Noblett* v. *Leitrim County Council*, [1920] 2 I.R. 143, and of the type appearing in the group of cases: *Tyler & Sons* v. *Cork County Council*, [1921] 2 I.R. 8; *Kirby* v. *Kerry County Council*, [1921] 2 I.R. 388; and *Congested Districts Board* v. *Mayo County Council*, 55 I.L.T.R. 4; so that the decisions in these cases as regards the measure of compensation under the Criminal Injuries Acts no longer represent the law. The effect of the section is to restore what was the true legal position, as regards the subject-matter in respect of which compensation is to be awarded, as it stood upon the enactment of sect. 5 of the Local Government (Ir.) Act, 1898. It is not the value of the spoil or plunder which is to be awarded, but compensation for the actual damage maliciously done to the property injured in the case of an unlawful and malicious spoliation within the meaning of sect. 51 of the Malicious Damage Act, 1861.

A case stated for the Supreme Court under the Criminal Injuries Acts stated that the grass of the applicant's meadow was cut and taken away, and the fences on his lands were maliciously damaged on a date within the period covered by Part II of the Damage to Property (Compensation) Act, 1923. There was no finding that the cutting or taking away of the grass was malicious, but it was admitted that both were unlawful:

Held by the Supreme Court that this admission, taken with the surrounding circumstances of fences found to have been maliciously injured on the same occasion, supplied, as regards the cutting of the grass, the omission from the case stated of an express finding that it was in fact malicious within the meaning of the Criminal Injuries Acts.

Held further, that the cutting and taking away of the grass of a meadow is different from the using of grazing lands as such, and may, according to the facts proved in a particular case, be a "spoiling" of property within sect. 51 of the Malicious Damage Act, 1861, entitling the owner to compensation under sect. 5 of the Local Government (Ir.) Act, 1898. But in order to recover such compensation the owner of the meadow must discharge the onus resting on him of proving destruction of or injury to his property, and he can only recover for the actual damage done to the property injured. As the applicant had not proved any injury to his property by the cutting of the grass, and as the taking away of the grass was not a subject for compensation, he was not entitled to any compensation for that part of his claim which related to the cutting and taking away of the grass.

Cahir v. *Minister for Finance*, [1925] 2 I.R. 150, distinguished.

(1) Before KENNEDY C.J. and FITZGIBBON and MURNAGHAN JJ.

Supreme Court. 1925.

KENNEDY v. MINISTER FOR FINANCE.

CASE STATED by Mr. Commissioner E. A. Swayne K.C., one of the Commissioners appointed under the County Court Appeals Act, 1924 (No. 57 of 1924), to hear appeals from the late County Court Judges remaining undisposed of at the time of the coming into operation of Part II of the Courts of Justice Act, 1924 (No. 10 of 1924).

The applicant, Eugene Kennedy, claimed compensation under the Criminal Injuries Acts as amended by the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), for damage to his property alleged to have been committed on November 1st, 1921. The applicant's case was that 36 acres of land and the growing produce thereon were maliciously spoiled, that fences and gates were broken, a hay-shed damaged, and a sheep-rack destroyed, and timber cut. On June 23rd, 1924, County Court Judge Wakely awarded the applicant £180 compensation together with costs, and on March 30th, 1925, Mr. Commissioner Swayne affirmed that award.

The case stated by the Commissioner for the opinion of the Supreme Court was as follows:—

"The applicant claimed compensation under the Criminal Injuries Act in respect of damage to his land by breaking down fences and by cutting and taking away the grass of his meadow.

"I found, as a fact, that his fences had been maliciously damaged, and awarded the sum of £32 as compensation for such damage. I further found that the grass of his meadow had been cut and taken away, as claimed, and that his loss in consequence of such cutting and taking away amounted to £150.

"It was contended, for the respondent, that the cutting and taking away of the grass was consistent with the intention to steal, and did not amount to malicious injury under the Acts. It was further contended that even if the taking of the grass was held to be malicious, I was precluded by Section 6 of the Damage to Property (Compensation) Act of 1923 from awarding compensation for the loss resulting therefrom as such loss was in effect the loss of the use of the lands.

"I awarded the applicant the sum of £180 in respect of the total damage to his lands, with £15 15s. 2d. for costs in the County Court, and £11 10s. for costs, and £2 for expenses on appeal.

"At the request of the respondent I now state this case for the opinion of the Supreme Court of Justice as to whether I should have allowed any compensation in respect of that part of the claim which related to the cutting and taking away of the grass.

"If the Court is of opinion that this part of the claim is unsustainable in law, the said decree for £180 is to be reduced by £148 to the sum of £32 with costs and expenses as before mentioned."

Costello K.C. and *Bewley*, for the Minister for Finance:—

The facts, as they have been found, bring the case within the decision in *Cahir* v. *The Minister for Finance* (1). This is a case either of larceny or trespass: *R.* v. *Foley* (2), and the onus rested upon the applicant to negative larceny. If what occurred was a trespass, his remedy was against the trespassers. At most, the applicant was only deprived of the use of the land, and by section 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), the right to compensation is limited to compensation for the actual damage done to the property injured and does not extend to compensation for the loss of the use of the property injured.

Leonard K.C. and *G. M'Carthy*, for the applicant:—

The cutting and taking away of the grass were all one transaction: *R.* v. *Townley* (3). By sect. 5, sub-sect. 1, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), compensation can be awarded for the maliciously setting fire to, destroying, or injuring property of any description, whether real or personal; but that Act does not extend the application of sect. 135 and the following sections of the Grand Jury Act, 1836, to any case "except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." Section 51 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), renders liable on indictment any person who "shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever . . . the damage, injury, or spoil being to an amount exceeding five pounds." The word "property" in these sections connotes the idea of ownership.

Sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), excludes compensation for any loss consequential on actual damage and "in particular" excludes compensation "for the loss of the use" of the property injured. "Use" in this section implies that, where a person gets back his property, he is not to be awarded compensation for dispossession, and is merely an example of what is consequential damage. The applicant in this case is not claiming for what he would have made if he had been allowed to use his land. In *Congested Districts Board* v. *Mayo County Council* (4) compensation was allowed for the value of trees cut down and taken away. There is no distinction between growing trees and growing grass.

Costello K.C., in reply:—The test is: Would an indictment lie against the perpetrators of the act in this case? To bring the case within the Malicious Injuries Code there must

(1) [1925] 2 I. R. 150.
(2) 17 Cox Cr. C. 142.
(3) L. R. 1 C. C. R. 315.
(4) 55 I. L. T. R. 4.

Supreme Court.
1925.
KENNEDY v. MINISTER FOR FINANCE.

be actual damage to the physical property: *Laws* v. *Eltringham* (1). There is no suggestion here that the lands were injured or that the meadow was improperly cut. There is no finding and no evidence that the cutting and removal of the grass were simultaneous acts, and therefore the facts are consistent with larceny.

Cur. adv. vult.

July 29.

KENNEDY C.J.:—

This case comes before us on a case stated by Mr. Commissioner E. A. Swayne K.C., who was one of the Commissioners appointed under the County Courts Appeals Act, 1924 (No. 57 of 1924), to hear appeals from the late County Court Judges remaining undisposed of at the time of the coming into operation of Part II of the Courts of Justice Act, 1924 (No. 10 of 1924).

The claim of the applicant, Eugene Kennedy, was made under the Criminal Injuries Acts, as amended by the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), for compensation for injury to his property, viz.: thirty-six acres of land and the growing produce thereon maliciously spoiled, fences and gates broken, hay-shed damaged, sheep-rack destroyed, and timber cut, all of which damage was alleged to have been committed on the 1st day of November, 1921. The application was originally heard, on the 23rd June, 1924, by County Court Judge Wakely, who gave the applicant a decree for £180 for compensation, together with costs. The decree of the County Court Judge was, on the 30th March, 1925, affirmed by Mr. Commissioner Swayne, who, however, at the request of the Minister for Finance, stated a case for the opinion of this Court upon the question of the applicant's right to compensation for grass cut and taken away. The case is stated very briefly, and it will be convenient to read it. It is as follows:— [Reads the case stated].

The case contains no finding that the cutting or taking away of the grass was malicious, but counsel on both sides here have agreed to state that it was admitted on the hearing that the cutting and taking away of the grass was unlawful, but not that there was malice within the Criminal Injuries Acts.

The meaning of "malice" within the Criminal Injuries Acts was examined and defined authoritatively in *M'Dowell* v. *The Corporation of Dublin* (2). It was there finally laid down that the element of personal spite or ill-will is not necessary. Speaking generally, if one wilfully does an unlawful act intentionally, calculated to injure another, one acts "maliciously" in the legal sense within the meaning of the Criminal Injuries Acts. The same case also ruled that a dominant motive to commit larceny does not exclude a wrongful act of mischief from the class of malicious acts which give the person injured

(1) 8 Q. B. D. 283. (2) [1903] 2 I. R. 541.

a right to compensation. The admission made that the cutting and taking away of the applicant's grass were unlawful, taken with the surrounding circumstances of fences found to have been maliciously injured on the same occasion, supplies, as regards the *cutting* of the grass, the omission from the case stated of an express finding that it was in fact "malicious" within the meaning of the Criminal Injuries Acts.

Assuming, then, that at least the cutting of the grass was malicious, has the applicant established a claim for compensation under the Criminal Injuries Acts? The case does not fall within the original ambit of sect. 135 of the Grand Jury (Ireland) Act, 1836, inasmuch as the claim does not arise out of the burning or destroying of "hay," the nearest case to it in the section. It must therefore be brought within the extension of that section made by sect. 5 of the Local Government (Ireland) Act, 1898, and based upon the Malicious Damage Act, 1861. The only section of the latter Act which appears to be relevant to the facts relied on in the present case is sect. 51.

It would be a formidable undertaking to examine, and an impossible one to reconcile, the accumulated reports of decisions upon the interpretation of some of the provisions of these Acts. This is especially so with regard to the years 1919 to 1921, when warlike conditions prevailed in this country and the Criminal Injuries Acts were pressed into service as a sort of War Losses Compensation Code. They were given, by way of interpretation in relation to the then existing conditions, extensions never dreamed of in the many years of their application to other circumstances. The Act of 1923 has pruned much of the growth of those years—how much I will presently discuss. It is profitable to turn from the maze of the reported cases to the actual provisions of the Acts themselves, too often, I fear, lost sight of in the debates upon claims. I will here refer only to the sections relevant to the present case.

Sect. 135 of the Grand Jury (Ireland) Act, 1836, applies to all cases of "maliciously or wantonly setting fire to, burning or destroying" any of a number of different kinds of property specified, including "any corn, hay, straw, or turf," and to cases of maliciously injuring certain other specified classes of property, and provides that, where an application for compensation is made in respect thereof, the County Court may "make a decree for such sum or sums of money as the person or persons so injured ought to receive for such injury or damage." It was formerly regarded as well settled that compensation could not be awarded under this section in respect of mere larceny.

By sect. 5, sub-sect. 1, of the Local Government (Ireland) Act, 1898, it was enacted that the section of the Grand Jury Act, 1836, which I have just quoted (and the following sections so far as unrepealed), should extend to the case of "maliciously setting fire to, destroying, or injuring property of any description, whether real or personal, in like manner as they

Supreme Court. 1925. KENNEDY v. MINISTER FOR FINANCE. Kennedy C.J.

apply to the setting fire to, injuring, or destroying the particular descriptions of property specified" in the section cited. The extension is, however, subject to the proviso that it "shall not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." It is, perhaps, not surprising, though I think wrong, that there has been a tendency to simplify this complicated legislation by reference, by looking to the Malicious Damage Act, 1861, to find the nature of the subject-matter in respect of which compensation may be awarded in a particular case. In my opinion, sect. 5, sub-sect. 1, of the Local Government (Ireland) Act, 1898, defines the new subject-matter of compensation added to sect. 135 of the Grand Jury (Ireland) Act, 1836, namely, injury or damage caused by the malicious setting fire to, destroying, or injuring property of any description, whether real or personal. But it limits the power to award such compensation to cases where the malicious act itself giving rise to the claim is a crime punishable on indictment under the Malicious Damage Act, 1861. The last-mentioned Act does not extend or add anything to the kinds of injury or damage for which compensation may be awarded. It limits the cases in which awards may be made.

In the present case, therefore, the applicant must first bring himself within sect. 5, sub-sect, 1, of the Act of 1898, and show that property of his, whether real or personal, has been maliciously destroyed or injured, and then he must show that the malicious act upon which he relies was a crime punishable on indictment under the Malicious Damage Act, 1861. His case depends upon sect. 51 of the Act of 1861, which renders liable on indictment any person who "shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever . . . the damage, injury, or spoil being to an amount exceeding five pounds."

We have heard, during the argument, a discussion on the meaning of the word "spoil." I incline to the view that it is used in its proper sense of "plunder" or "pillage"—*e.g.*, "and they spoiled the Egyptians"—though in now current language it is used in the sense of marring or wasting something. Assuming that it does signify "plunder" or "pillage," in my opinion, nothing is added thereby to the application of the section of the Local Government Act. The subject of compensation is the malicious destroying or injuring of property, and it would, in that view, be awarded in a case where the malicious act done is the crime of spoil, plunder, or pillage, to an amount exceeding five pounds. This view accords with the decision in *M'Dowell* v. *The Corporation of Dublin* (1); and with the opinions expressed by the majority of the Court in *Leyburn* v. *Armagh County Council* (*No. 2*) (2), disapproving of the decision in *Congested Districts Board* v. *Mayo County Council* (3).

(1) [1903] 2 I.R. 541. (2) [1922] 2 I.R. 58. (3) 55 Ir. L.T.R. 4.

Kennedy C.J.

Now, by our own Act, the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), sect. 6, it has been enacted that: "The right to compensation under the Criminal Injuries Acts shall, as respects any injury to which this Part of this Act applies, be limited to compensation for the actual damage done to the property injured, and shall not extend to any compensation for any loss consequential on such actual damage, and in particular shall not extend to compensation for the loss of the use of property injured, or for the loss of mere pleasure or amenity."

The enactment of that section followed upon two lines of decision (expounded for the most part in elaborate judgments of Sir James Campbell C.), which, during the preceding three or four years had set an entirely new measure to the compensation to be awarded under the Criminal Injuries Acts, and upset what had been for many years the accepted reading of the Acts.

In *Noblett* v. *Leitrim County Council* (1) we have one line of expansion of the compensation awarded under the Criminal Injuries Acts. There, the former Court of Appeal held that an applicant whose plough was maliciously damaged to the extent of £2 was also entitled to compensation to the amount of £3 5s. for loss suffered through deprivation of the use of the plough until it was repaired. The judgment of the Court was delivered by Sir James Campbell C., who said (at page 153): "We have, therefore, no hesitation in deciding that in all claims for malicious injuries under the Act of 1836, as extended and applied by the Local Government (Ireland) Act, 1898, sect. 5, the amount to be awarded, where the claim is proved, should include compensation for all loss or damage which is the natural and direct consequence of the injury inflicted, or, in other words, that the same principle is to be applied as if it were a civil action in tort against the actual wrongdoer himself."

The wide statement just quoted opened the way to the second line of cases typified by the case of *Tyler & Sons* v. *Cork County Council* (2), where a military party riotously demolished the shop-front of the applicants, and flung into the street a quantity of boots which were displayed there for sale. The raiders did not take away any of the boots, but a number of unascertained persons stole a quantity of them. The late Court of Appeal held that the entire injury was the direct result of the action of the rioters, whose sole and dominating motive was to injure property, and that larceny was the natural and probable consequence of the malicious act of demolishing the shop and scattering the goods, and, therefore, that the applicants were entitled to compensation for the loss of the stolen goods.

Next we have the case of *Congested Districts Board* v. *Mayo County Council* (3). There, a large number of persons cut and carted away a quantity of trees from the applicants' wood. In the case stated it was found that the raiders were unlawfully

(1) [1920] 2 I. R. 143. (2) [1921] 2 I. R. 8. (3) 55 Ir. L. T. R. 4.

Supreme Court. 1925.

KENNEDY v. MINISTER FOR FINANCE.

Kennedy C.J.

assembled, that they maliciously cut and damaged the growing trees in the execution of their primary object, which was to steal timber, and that the cutting down and the larceny were all part of the same transaction. The Court of Appeal held that the applicants were entitled to compensation for the value of the timber taken away. "Where such malicious injury is a necessary preliminary to the commission of the theft or where the theft is the natural and direct consequence, or the result contemplated and intended, the party injured is, in my opinion, entitled to compensation for all damages so sustained": *per* Sir James Campbell C., at p. 7.

In *Kirby* v. *Kerry County Council* (1) some persons entered a shop burglariously (so found in the case stated), and tossed about a quantity of stock, making a selection of goods of considerable value which they took away for their own use and benefit. The Court of Appeal held that the case was governed by *Tyler* v. *Cork County Council* (2) and *Congested Districts Board* v. *Mayo County Council* (3), and that the applicant was entitled to compensation for the value of the goods stolen as well as for the damage to the premises and stock. At this point we have a complete cycle from *M'Dowell* v. *Corporation of Dublin* (4), when Holmes L.J. stated the law, as then understood, in the well-known passage, at p. 556:—"Legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief, and this is something to be thankful for, but until the law is changed they must pay for wilful destruction or injury to property even when the object of the culprit is to commit a larceny."

The question was again raised before the late High Court of Appeal in the case of *Leyburn* v. *Armagh County Council* (*No. 2*) (5), when the decision in *Kirby* v. *Kerry County Council* (1) was expressly over-ruled. A majority of the Judges also expressed their disapproval of the decision in *Congested Districts Board* v. *Mayo County Council* (3) and of passages in the judgments in *Tyler* v. *Cork County Council* (2). As to the former case, Sir John Ross C. said, at p. 64: "I think damages were given on a wrong principle. They might properly have been given in respect of the injury to the wood by cutting down the trees. I think the decision erroneous in awarding compensation in respect of the value of the trees taken away."

I have gone through this series of decisions because, in my opinion, if we are to interpret correctly the expression "consequential loss" for the purposes of sect. 6 of the Damage to Property (Compensation) Act, 1923, we must ascertain (according to the well-established rules of interpretation) the sense in which it was current at the time when the Act was passing through the Oireachtas, and that meaning is to be found in the group

(1) [1921] 2 I. R. 388.
(2) [1921] 2 I. R. 8.
(3) 55 Ir. L. T. R. 4.
(4) [1903] 2 I. R. 541.
(5) [1922] 2 I. R. 58.

of decisions I have cited, but especially in the judgments of Sir James Campbell C. In my opinion, therefore, the section forbids the awarding of compensation for "consequential loss" both of the type appearing in *Noblett* v. *Leitrim County Council* (1) and of the type appearing in the group of cases: *Tyler and Sons* v. *Cork County Council* (2); *Kirby* v. *Kerry County Council* (3); and *Congested Districts Board* v. *Mayo County Council* (4); so that the decisions in these cases, as regards the measure of compensation under the Criminal Injuries Acts, no longer represent the law (if they ever did). In my opinion, the effect of the section is to restore what was the true legal position, as regards the subject-matter in respect of which compensation is to be awarded, as it stood upon the enactment of sect. 5 of the Local Government (Ireland) Act, 1898. It is not the value of the spoil or plunder which is to be awarded, but compensation for the actual damage maliciously done to the property injured in the case of an unlawful and malicious spoliation within sect. 51 of the Malicious Damage Act, 1861.

Now let us see how the present case stands upon the law so explained. In the first place, this is not a claim in respect of loss of use of land, and I cannot accept the argument that *Cahir* v. *The Minister for Finance* (5) applies. There we were dealing with a case of deprivation of the use of grazing lands. Here we are dealing with a case of the cutting and taking away of the grass of a meadow. If a meadow stands till it is cut in due season, the owner has had the use of the land as he has chosen to use it for the time being. In my opinion, the cutting and taking away of the grass of a meadow is a different case from that of using grazing lands as such, and may, according to the facts proved in a particular case, be a spoiling of property within sect. 51 of the Malicious Damage Act, 1861, entitling the owner to compensation under sect. 5 of the Local Government (Ireland) Act, 1898. But in order to recover such compensation the owner of the meadow must discharge the onus which rests on him of proving destruction of or injury to his property, and he may only recover for the actual damage done to the property injured. The grass of a meadow is raised with the intention that it will be cut at such time as it will be ripe for the making of hay. If it be cut in a proper manner and at the proper time, such cutting (though it be by the malicious act of persons who have no lawful right to cut it) is not an injury to the meadow; on the contrary, it may be a gain to the owner. But it may be cut before its time, and perhaps several times in the season, and the meadow destroyed as meadow. The Commissioner has not found that the date of the cutting in the present case, the 1st of November, has any significance. Again, it may be cut in such a manner as to destroy it. There are said to be,

(1) [1920] 2 I. R. 143.
(2) [1921] 2 I. R. 8.
(3) [1921] 2 I. R. 388.
(4) 55 Ir. L. T. R. 4.
(5) [1925] 2 I. R. 150.

Supreme Court. 1925. KENNEDY v. MINISTER FOR FINANCE. Kennedy C.J.

in some parts of the country, people who are so greedy to have the full length of the meadowing they buy, that, when cutting it, they skin the sod, and so destroy the roots. It is, therefore, I think, possible so to cut grass as to do injury to the meadow lands; but the onus is on the applicant for compensation to prove actual damage. Upon the case stated here, even assuming (as I have already done) that the cutting was malicious (the Commissioner has certainly not found the taking away of the grass to be malicious), the applicant has not discharged the onus of proving the destruction of or any injury to his property. The Commissioner was, in my opinion, wrong in awarding compensation for the cutting of the grass without proof of injury thereby done, and for the taking away of the grass which (for the reasons I have stated upon the interpretation of the Acts) was not a subject for compensation. The answer to the question submitted must therefore be that, on the facts found and stated in the case, the Commissioner should not have allowed any compensation in respect of that part of the claim which related to the cutting and taking away of the grass. The decree will, therefore, be reduced to the sum of £32, with costs and expenses, as mentioned in the case. The respondent must pay the costs of the appeal (1).

FITZGIBBON J. :—I agree.

MURNAGHAN J. :—I also agree.

Solicitor for the Minister for Finance: *M. A. Corrigan, Chief State Solicitor.*

Solicitor for the applicant: *C. E. Callan.*

C. L.

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(1) [Sect. 6 of the Damage to Property (Compensation) Act, 1923, is in Part II of the Act, and that Part applies to "injuries to property which occurred after the 11th day of July, 1921, and on or before, but not after, the 12th day of May, 1923, and in respect of which compensation could have been given under the Criminal Injuries Acts if this Act had not been passed," by sect. 16 of the Act, as amended by sect. 1 (1) (*c*) of the Damage to Property (Amendment) Act, 1923 (No. 43 of 1923).—ED.]

EDWARD CONNOLLY AND WILLIAM CONNOLLY, APPLICANTS, *v.* THE MINISTER FOR FINANCE, RESPONDENT (1).

Supreme Court.
1925.
June 8.
July 29.

Malicious injury—Trees cut down and carted away—Claim for compensation—No proof of ownership—Theft—Malice—Insufficiency of findings—Malicious Injuries (Ir.) Act, 1853 (16 & 17 *Vict. c.* 38), *sect.* 1—*Local Government (Ir.) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5—*Damage to Property (Compensation) Act*, 1923 (*No.* 15 *of* 1923), *sect.* 6.

The applicants, timber merchants, claimed compensation under the Criminal Injuries Acts in respect of 175 growing trees, which had been purchased by them, together with other timber, from F. on the latter's demesne lands. It was proved that the trees in question were, on different dates between November, 1921, and July, 1922, felled, cut, and carted away by a large number of persons resident in the neighbourhood. The trees had been felled in a manner which rendered them unsuitable for the purposes of the applicants. There was no evidence as to whether the persons who felled and carted away the trees constituted an unlawful assembly; and no evidence was given as to the nature of the purchase transaction between the applicants and F. On the authority of *Congested Districts Board* v. *Mayo County Council*, 55 Ir.L.T.R. 4, the Commissioner acting under the County Court Appeals Act, 1924 (No. 57 of 1924), awarded compensation to the applicants, and this included compensation for the timber taken away. On appeal to the Supreme Court by way of case stated:

Held, applying *Kennedy* v. *Minister for Finance*, ante, p. 195, that the decision in the *Congested Districts Board* v. *Mayo County Council*, 55 Ir.L.T.R. 4, was erroneous in ruling that compensation should be given in respect of the value of the trees taken away; and that sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), expressly forbids the awarding of such compensation.

Held also, that the applicants had not shown that the corporeal tangible property alleged to have been injured was, at the time of the damage, actually vested in them so as to entitle them to make a claim under the Criminal Injuries Acts, and that the findings of the Commissioner did not justify any award of compensation.

CASE STATED by Mr. Commissioner Swayne K.C., acting as Commissioner under the County Court Appeals Act, 1924 (No. 57 of 1924), appointed to hear appeals from County Court Judges to Judges of Assize, which were pending at the commencement of Part II of the Courts of Justice Act, 1924. The case stated was as follows:—

"The applicants, who are timber merchants, claimed compensation under the Criminal Injuries Acts in respect of 175 growing trees, which had been purchased by them together with other timber from Lord de Freyne on his demesne lands at Erritt, Co. Roscommon. It was proved to my satisfaction that the trees in question were, on different dates, between November, 1921, and July, 1922, felled, cut, and carted away by a great number of persons resident in the neighbourhood. These trees had been felled in a manner which rendered the timber unsuitable for the purposes of the applicants.

(1) Before KENNEDY C.J. and FITZGIBBON and MURNAGHAN JJ.

Supreme Court. 1925.

CONNOLLY v. MINISTER FOR FINANCE.

"The notice of application included, in addition to the claim for injury to growing trees, a claim for the loss of timber (on the same lands) which had also been purchased by the applicants, and had been felled by them, but was carted away by the same persons; but Mr. Leonard K.C., who appeared for the applicants, abandoned this portion of the claim.

"Mr. Bewley, who appeared for the respondent, contended that the acts proved did not amount to malicious injury under the Acts, and were consistent with the intention to steal. Mr. Leonard quoted the case of *Congested Districts Board* v. *Mayo County Council* (1).

"I held that I was bound by the authority cited and gave a decree for £175 with £7 6s. 3d. costs in the County Court, and £13 10s. costs and £1 1s. expenses on appeal.

"At the request of the respondent, I now state this case for the opinion of the Supreme Court of Justice as to whether, on the facts found by me, I was precluded from awarding compensation under the Criminal Injuries Acts. If the Court is of opinion that I was so precluded, the application must be refused with £11 10s. costs."

Costello K.C. and *Bewley*, for the Minister for Finance :—

We submit: 1.—That the decision in *Congested Districts Board* v. *Mayo County Council* (1) has no application to the facts in this case. Moreover, in consequence of sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), that decision is no longer authority, even if it were authority before the passing of that Act for the proposition relied upon by the applicant. But we do not admit that that decision was an authority before the passing of the Act for the proposition relied on, having regard to the fact that it was practically overruled by *Leyburn* v. *Armagh County Council* (*No. 2*) (2).

2.—That the substance of this transaction is that the trees in question were stolen, and that for this reason alone the case does not come within the Malicious Injuries Acts. The very ambiguous finding by the Commissioner that the trees had been felled in a manner which rendered the timber unsuitable for the applicants' purposes does not exclude larceny: *In re Elliott* (3), *per* Perrin J., at page 102; *Moyle* v. *Meath County Council* (4); *Lord Kenmare* v. *Kerry County Council* (5). Until the decision in *Tyler and Sons* v. *Cork County Council* (6) it had always been assumed that larceny was not the subject of compensation under the Criminal Injuries Acts, and it was so held in *M'Dowell* v. *Corporation of Dublin* (7). The basis of the decisions in *Noblett* v. *Leitrim County Council* (8) and *Congested Districts Board* v. *Mayo County Council* (1) was

(1) 55 Ir. L. T. R. 4.
(2) [1922] 2 I. R. 58.
(3) 9 I. L. R. 100.
(4) 4 N. I. J. R. 127.
(5) 34 Ir. L. T. R. 11.
(6) [1921] 2 I. R. 8.
(7) [1903] 2 I. R. 541, at p. 556.
(8) [1920] 2 I. R. 143.

consequential loss; but consequential loss is excluded by sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923).

3.—Putting aside larceny, the facts found in the case are insufficient to bring the applicants within the Malicious Injuries Code. There is no finding that the acts complained of were caused by an unlawful assembly, and, therefore, the Malicious Injuries (Ireland) Act, 1853 (16 & 17 Vict. c. 38) cannot apply. Nor does the case come within the extension of sect. 135 of the Grand Jury (Ir.) Act, 1836, contained in sect. 5 of the Local Government (Ir.) Act, 1898, as that extension only applies where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). Here, the malicious acts complained of were not crimes punishable on indictment. This case does not fall within any of the specific provisions in the Malicious Damage Act, 1861. In order to succeed, the applicant must bring himself within sect. 51 of that Act by proving that damage to an amount exceeding £5 was done to each tree: see sect. 21 of the Act. The case stated contains no such finding. Evidence of damage committed at several times, in the aggregate, but not at any one time, exceeding £5, will not sustain an indictment under the Malicious Damage Act, 1861: *Reg.* v. *Williams* (1).

The applicants had no interest in the lands; they merely bought the growing trees. A sale of growing timber has been held not to be a contract or sale of lands or any interest therein, within the fourth section of the Statute of Frauds: *Marshall* v. *Green* (2); *Smith* v. *Surman* (3), though a contrary view has also been taken: *Scorell* v. *Boxall* (4); *Lavery* v. *Pursell* (5).

Leonard K.C. and *G. M'Carthy,* for the applicants:—

It was admitted by the other side at the hearing in the Court below that there was an unlawful assembly. Even assuming that the facts are consistent with larceny it has been held in *Congested Districts Board* v. *Mayo County Council* (6) that where there is an intention to steal on the part of an unlawful assembly the application of the Criminal Injuries Acts is not excluded. Under Sect. 21 or 51 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), there has been damage to an amount exceeding £5. It is not necessary that the damage to each tree should exceed £5.

The applicants had sufficient interest to maintain a claim for compensation as they were "persons injured" by the destruction of the timber: *"The Winkfield"* (7); *Worthington* v. *Tipperary County Council, S.R.* (8); *Lord Lansdowne* v. *Kerry County Council* (9).

(1) 9 Cox C. C. 338.
(2) 1 C. P. D. 35.
(3) 9 B. & C. 561.
(4) 1 Y. & J. 396.
(5) 39 Ch. Div. 508.
(6) 55 Ir. L. T. R. 4.
(7) [1902] P. 42.
(8) [1920] 2 I. R. 233.
(9) [1925] 2 I. R. 87.

Supreme Court. 1925.

CONNOLLY v. MINISTER FOR FINANCE.

Costello K.C., in reply:—

The basis of the decision in the *Lansdowne Case* (1) was that there was an injury to the wood as a property.

The Court at the conclusion of the arguments addressed the following questions to the Commissioner:—

1.—Whether it was, or was not, admitted by the counsel for the Minister for Finance, or, if not so admitted, whether it was found by the Commissioner upon evidence submitted to him that the "large number of persons by whom the trees were felled, cut, and carted away on different dates" constituted an unlawful assembly?

2.—Did the award of £175 include compensation for the value of the timber carried away?

The replies received from the Commissioner were as follows:—

1.—No question of unlawful assembly was raised. The case proceeded altogether on the basis set out in the case stated. I would have held on the evidence before me that they were unlawful assemblies.

2.—Yes.

Cur. adv. vult.

July 29.

KENNEDY C.J.:—

This case comes before us on a case stated by Mr. Commissioner Swayne K.C., acting as Commissioner under the County Court Appeals Act, 1924 (Act No. 57 of 1924). I will read the case, which is very shortly stated, as follows:—[Reads the case stated.]

Having regard to the course of the argument, we desired to know whether or not the Commissioner intended to convey that the "great number of persons" referred to in the first paragraph of the case constituted an unlawful assembly, and whether it was so found by him or admitted on behalf of the Minister for Finance. We accordingly addressed an enquiry to the Commissioner, who replied that no question of unlawful assembly was raised, and that the case proceeded altogether on the basis set out in the case stated. He also informed us, in reply to a further question, that the award included compensation for the value of the timber carried away.

For the reasons which I have stated in *Kennedy* v. *Minister for Finance* (2), when considering the meaning of consequential loss, compensation for which is now prohibited by sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), I am of opinion that the decision in *Congested Districts Board* v. *Mayo County Council* (3) was erroneous in ruling that compensation should be given in respect of the value of the trees taken away. I am further of opinion that sect. 6 of the Act of 1923 now expressly forbids the awarding

(1) [1925] 2 I. R. 87. (2) *Ante*, p. 195. (3) 55 Ir. L. T. R. 4.

of such compensation. The Commissioner was, therefore, in my opinion, wrong in holding that he was bound by the authority of that decision, and in awarding compensation on that basis.

Indeed, as Mr. Costello pointed out, *Congested Districts Board* v. *Mayo County Council* (1) has no application to the facts found by the Commissioner. Reading the very full and careful findings of fact by Mr. Justice Moore on every appropriate matter as they are set out in the report of that case, which was before the Commissioner, we can only assume that the Commissioner had not the necessary materials, in the evidence given, to enable him to arrive at findings on several important matters of fact required to support the claim of the applicants. In other words, the applicants have not discharged the onus of proof resting upon them.

The claim was made in respect of one hundred and seventy-five trees felled and carted away at different dates between November, 1921, and July, 1922, a period which comprises at least two hundred and twelve days. There is no finding that all the fellings or any several of them constituted a single transaction. It is quite consistent with the case that the felling of each tree was a single transaction of a single day.

Again, there is no finding as to the amount of damage in the case of any individual tree or group of trees. The award of £175 is made in respect of the felling and taking away of one hundred and seventy-five trees, which is consistent with, and looks like an award of, one pound for each tree (including the value of the timber taken away).

The nature of the purchase transaction with Lord De Freyne was an essential part of the applicants' proofs, and they failed to obtain a finding upon which their claim could be founded. The trees in question were growing on Lord De Freyne's demesne lands. There is no evidence on the point, but if one might make an assumption, it would be that such of the timber on the demesne as was ready for cutting, that is to say, trees selected and marked, were the subject of the purchase. What was the nature of the sale? Was it an agreement by which the applicants would have the right to enter and cut and remove timber? They have not shown that the corporeal tangible property alleged to have been injured was, at the time of the damage, actually vested in them, so as to entitle them to make a claim under the Criminal Injuries Acts.

The only finding as regards injury or damage done to property is the ambiguous one that "the trees had been felled in a manner which rendered the timber unsuitable for the purpose of the applicants." The Commissioner has not assessed any money value on the actual damage (if any) sustained by the applicants by reason of such felling. The whole award may be for timber taken away.

(1) 55 Ir. L. T. R. 4.

Supreme Court. 1925.

CONNOLLY v. MINISTER FOR FINANCE.

Kennedy C.J.

Further, the Commissioner has not found that the felling of the trees was "malicious" within the meaning of the Criminal Injuries Acts. I have discussed in *Kennedy* v. *The Minister for Finance* (1), the essentials of "malice" for the purpose of these Acts. It is not excluded by an intention to steal, but the facts as stated here do not necessarily prove malice. They are consistent, for instance, with the exercise of a claim of right in the woods on the Erritt demesne.

The matter is submitted to us as a question for decision on the facts found by the Commissioner. In my opinion, our decision must be, first, that the Commissioner was precluded from awarding compensation in respect of the timber carried away; and, secondly, that the findings of the Commissioner do not justify any award of compensation in respect of any other matter stated in the case. The decree must, therefore, be discharged, and the application for compensation refused, with costs.

FITZGIBBON J.:—I concur.

MURNAGHAN J.:—I also concur.

Solicitor for the Minister for Finance: *M. A. Corrigan, Chief State Solicitor.*

Solicitor for the applicants: *M. Staunton.*

C. L.

(1) *Ante*, p. 195.

PATRICK LOGAN, PLAINTIFF, *v.* FRANK O'DONNELL, DEFENDANT (1).

Supreme Court. 1925. Mar. 5, 6, 9. April 29.

Negligence — Contributory negligence — Collision between motor-car and motor-cycle—Personal injuries—Form of questions to be put to jury—Jury finding negligence generally—No duty to find a specific negligent act or omission.

Plaintiff was driving a motor-bicycle with a side-car attached down hill on a winding road with blind turnings. The defendant was driving a motor-car up the same hill. The two machines collided at a blind turning, and, as a result of the collision, the plaintiff was seriously injured. Plaintiff was going at 7 miles an hour; the defendant, on his own evidence, was going at least 15 miles an hour, but witnesses estimated his speed at from 20 to 28 miles an hour. There was conflicting evidence as to whether either the plaintiff or the defendant was on his proper side of the road. Neither sounded his horn when immediately approaching the turn where the accident happened. Three questions were left to the jury:—(1) Was the defendant negligent? (2) Was the plaintiff negligent? (3) Could the defendant by the exercise of reasonable care have avoided the collision? The Judge declined to put the first question in the following form:—"Was the defendant guilty of negligence (*a*) by driving at an excessive speed; (*b*) by driving on the wrong side of the road; (*c*) by not keeping a proper look-out?" All three questions were answered by the jury in the affirmative, and on these findings the Judge entered judgment for the plaintiff. It was admitted that the Judge gave proper directions to the jury.

Held by the Supreme Court that the jury was entitled to find negligence generally, without any finding of a specific negligent act or omission, and that the questions put to the jury met the requirements of the case, and there was evidence to support the findings.

Form of questions to be put to the jury considered.

Per Kennedy C.J.: There was evidence upon which it was open to a jury to find that the defendant had the final opportunity to avoid the collision, which it was his duty to avoid if he could, however negligent the plaintiff may have been, and that he failed in that opportunity, and that his failure was the immediate and effective cause of the accident.

Decisions relating to contributory negligence considered by FitzGibbon J.

MOTION for a new trial, or, in the alternative, that judgment entered for the plaintiff might be entered for the defendant.

The action was brought to recover damages for injuries caused to the plaintiff by the defendant by reason of the defendant's negligent and unskilful management and driving of a motor-car. The plaintiff was travelling down hill on a motor-bicycle with a side-car attached upon a tortuous public road with a generally steep gradient and blind turnings. The defendant was driving a motor-car up hill on the same road. A collision took place at a blind turning. The plaintiff's speed according to the evidence was about 7 miles per hour. The defendant's speed according to himself was at least 15 miles per hour, and was estimated by other witnesses at from 20 to 28 miles per hour. There was some evidence that the plaintiff was not on his proper side of the road immediately before and at the time

(1) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

Supreme Court. 1925.

LOGAN v. O'DONNELL.

the accident happened. There was also evidence that the defendant for some time before and at the time of the accident was on his wrong side of the road. Neither the plaintiff nor defendant sounded his horn immediately preceding the accident.

The action was tried by Sullivan P. with a common jury, to whom the learned Judge put four questions, which, with the answers of the jury, were as follow:—

1. Was the defendant negligent? Answer—Yes.
2. Was the plaintiff negligent? Answer—Yes.
3. Could the defendant by the exercise of reasonable care have avoided the collision? Answer—Yes.
4. Assess damages. £750.

Whereupon judgment was entered for the plaintiff.

Counsel on behalf of the defendant had objected to the questions submitted to the jury, and had requested the Judge to leave to the jury the issue as to the negligence of the defendant in question No. 1 in the form in which that negligence was pleaded, with particulars, in the statement of claim, and had requested that the first question be put in the following form:—

1. Was the defendant guilty of negligence (*a*) by driving at an excessive speed; (*b*) by driving on the wrong side of the road; (*c*) by not keeping a proper look-out?

Sullivan P. had declined to put the question in that form, and on the findings judgment was entered for the plaintiff.

The defendant applied to the Supreme Court to have the verdict and judgment set aside, and that a new trial might be ordered, or, in the alternative, that judgment might be entered for the defendant on the ground that the verdict and judgment was against the weight of evidence, and upon the further grounds that (*a*) the learned Judge should have acceded to the defendant's requisition and left the questions to the jury in the form mentioned in the requisition and in accordance with the pleadings in the action; (*b*) that the facts proved at the trial were equally consistent with the injury having been caused by the plaintiff's sole negligence; (*c*) that the defendant's negligence (if any) was not the proximate or effective cause of the injury; and (*d*) that the injury was caused by inevitable accident.

Lupton K.C. and *J. M. Fitzgerald K.C.* (with them *Cahir Davitt*), for the appellant:—As the evidence only established facts which were equally consistent with the true cause of the accident being the negligence of either of the parties to the action, the respondent should not have succeeded. Both parties were negligent, and it was for the respondent to prove that the appellant could, by the exercise of reasonable care, have abstained from the act or omission which caused the injury: *Radley* v. *London & North Western Railway Co.* (1); *Reynolds* v. *Thomas Tilling, Ltd.* (2); *Butterly* v. *Droghcda Corporation* (3).

(1) 1 A.C. 754. (2) 19 T. L. R. 539. (3) [1907] 2 I. R. 134.

A further question ought to have been put to the jury:—Could the respondent by the exercise of reasonable care have avoided the collision? The fact that counsel did not submit this question to the Judge at the trial to be put to the jury does not prevent it now being raised. It is the Judge's duty to put the proper questions: *Weiser* v. *Segar* (1). The jury should have been asked to find in what respect the appellant was negligent; and if that had been done it would have been found that the negligence (if any) of the appellant was prior in point of time to the negligence of the respondent, and therefore was not the proximate cause of the collision.

O'Connor K.C. and *Wood K.C.* (with them *H. Hamilton*), for the respondent:—

No exception was taken to the Judge's charge, and it is admitted by the appellant that the Judge properly instructed the jury as regards question No. 3. The real question is this:—Did the respondent submit sufficient evidence to the jury to justify the verdict? This is not a case in which chronology is of importance. It is a case of the antecedent negligence of the appellant lasting up to the time of the accident and operating at that moment. The questions put to the jury were correct in form, and asking the jury to find on specific heads was tantamount to cross-examining the jury, which should not be allowed: *Gaffney* v. *Dublin United Tramways Co.* (2). There was ample evidence to support the findings: *Scott* v. *Dublin & Wicklow Railway* (3); *British Columbia Electric Railway Co.* v. *Loach* (4).

Lupton K.C., in reply.

Cur. adv. vult.

April 29.

KENNEDY C.J.:—In this action the plaintiff claimed, and was awarded by the jury, damages for the injuries sustained by him in a collision, which occurred on the 18th of May last, at a dangerous curve upon the public road, called the Ballyedmonduff Road, leading from Glencullen to Stepaside, in the County of Dublin. The defendant—who had a lady passenger with him—was driving his motor-car from Dublin to Glencullen. The plaintiff had, shortly before, travelled out from Dublin on his motor-bicycle (to which a side-car was attached) and had brought with him two passengers—his sister and her husband, whom he had set down at a point on the Dublin side of the curve in question. He had then driven on for a short distance beyond the bend in the road in order to turn his machine and come back to pick up his passengers again and take them back into town. He was therefore returning to his tryst at the moment of the collision, and, if nothing had happened, must have come to a stand-still a short distance further on the road. The plaintiff's evidence is that he was at the moment of the

(1) [1904] W.N. 93.
(2) [1916] 2 I.R. 472.
(3) 11 I.C.L.R. 377.
(4) [1916] 1 A.C. 719.

Supreme Court. 1925. LOGAN v. O'DONNELL. Kennedy C.J.

collision driving his motor-bicycle at a speed of 7 miles an hour, and this is hardly questioned. The defendant was coming up the road at a speed which he himself admits was at least 15 miles an hour, and, he says, he does not think it was 20—while some eye-witnesses gave evidence which would go to show that, just before the accident, he was travelling at a rate of about 25 or even up to 28 miles an hour. The collision occurred in the bend of the road, which is a sharp and dangerous turn, and at a point where the metalled road is 12 feet wide and has a rise of 1 in 13·2 up towards Glencullen. The plaintiff did not sound his horn approaching the turn. The defendant had sounded his horn some distance off, but not immediately approaching the turn of the road. There is no controversy as to the omission to sound the horn in either case. The defendant admits that he saw the plaintiff approaching when he was 30 yards away. The plaintiff, on the other hand, says that on approaching the bend in the road, the defendant's motor-car loomed up about 4 yards off. The plaintiff's machine was at the time "in neutral," that is to say, the engine was running but not contributing to the propulsion of the machine. The plaintiff, who says that the defendant's car was on his (the plaintiff's) side of the road, says that when the car loomed up he tried to stop his motor-bicycle and put on the hand and foot brakes. The defendant, who swore that the left wheel of his motor-car was well in to his left side of the road, said that there was plenty of room for the plaintiff to pass him; that the plaintiff's machine wriggled or swerved out towards him; that he (the defendant) turned sharp in to the left on the grass margin, put out his clutch and (though his evidence on this is not satisfactory) put on the brake; but that he did not put on his emergency brake, which is a hand brake. After the accident the motor-car was in the position that its front wheels were driven in on the grass bank at its left-hand side of the road, while the body of the car was turned across the road. The motor-bicycle was standing on its left-hand side of the road, with its front wheel close to the back wheel of the car. The collision seems to have been in the nature of a glancing contact, that is to say, that the motor-cycle glanced along the right-hand side of the motor-car before coming to a stand-still. The principal controversy of fact was as to the position of the motor-car as it approached the bend in the road and came into collision, and the position of the motor-bicycle as it came down towards the point of collision. There being conflicting evidence on this matter, it was one entirely for the jury, and I do not venture any opinion as to where the truth lay. There is no doubt that the plaintiff suffered very grave injuries, and he brought his action alleging negligence on the part of the defendant—which negligence was stated in the particulars to consist in the driving of the motor-car at an excessive speed round the curve of the road and upon the wrong side of the

road and without any horn being sounded and without any proper or sufficient look-out. The defendant pleaded that the alleged damage was caused solely by the plaintiff's own negligence, and that the plaintiff was guilty of contributory negligence; to which the plaintiff replied that, if there was any negligence on his part, the defendant could, nevertheless, by the exercise of ordinary care, have avoided causing the damage complained of.

The action was tried by the President of the High Court with a common jury, to whom the learned Judge put four questions, which, with the answers of the jury, were as follow:—

1. Was the defendant negligent? Yes.
2. Was the plaintiff negligent? Yes.
3. Could the defendant by the exercise of reasonable care have avoided the collision? Yes.
4. Assess damages. £750.

Whereupon judgment was given for the plaintiff for £750.

No objection was taken to the charge of the learned President, but Mr. Lupton, on behalf of the defendant, objected to the questions, and requested the Judge to leave to the jury the issue as to the negligence of the defendant in question 1, in the form in which that negligence was pleaded with particulars in the statement of claim, and requested that the first question should be put in the following form:—

1. Was the defendant guilty of negligence (*a*) by driving at an excessive speed; (*b*) by driving on the wrong side of the road; (*c*) by not keeping a proper look-out?

The Judge declined to put the first question in the suggested form. The defendant now moves for a new trial upon the particular grounds that (*a*) the learned Judge should have acceded to the defendant's requisition and left the questions to the jury in the form mentioned in the said requisition and in accordance with the pleadings in the action; (*b*) that the facts proved at the trial were equally consistent with the injury having been caused by the plaintiff's sole negligence; (*c*) that the defendant's negligence (if any) was not the proximate or effective cause of the injury; (*d*) that the injury was caused by an inevitable accident.

No exception of any kind was taken to the charge of the trial Judge. It was expressly admitted by counsel on both sides here in the course of the argument that the Judge properly instructed the jury, in particular, as regards the third question, so that, as Mr. Lupton admitted in answer to me, he would take that question as if it had been put in the fuller form—"Could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence?"

But it was contended that the Judge should have yielded to Mr. Lupton's requisition, and required the jury to find on specific heads of particulars of negligence. Mr. Fitzgerald put

Supreme Court. 1925.

LOGAN v. O'DONNELL.

Kennedy C.J.

it that the Judge "should not leave the jury to their own sweet will." The avowed object of the defendant's counsel in seeking to break up the question as to the defendant's negligence into particularized headings was that they might then have got findings from which it would appear that all the negligence of the defendant was prior in point of time to the negligence of the plaintiff, and therefore not the proximate cause of the collision.

It is, however, I think, now well settled that the jury is entitled to find negligence generally without any finding of a specific negligent act or omission, and, while the Judge may in his discretion in the conduct of a trial see fit in a particular case to ask a jury for a finding on one or more specific headings of negligence, there is abundant authority for saying that collision cases of this type are best tried by the three questions adopted by the Judge in the present case, subject however to certain observations upon the framing of the third question: *Gaffney* v. *Dublin United Tramways Co., Ltd* (1); *Neenan* v. *Hosford* (2). The multiplying of questions is the multiplying of opportunities for disagreement, and that is to be avoided—so far as it can be avoided consistently with the obtaining of sound verdicts and the doing of justice between the parties. In my opinion, the present case did not call for the analytical questions proposed on the part of the defendant, and the learned President of the High Court was right in leaving it to the jury on the three questions put by him, with—as it is admitted—proper directions to guide them in arriving at their findings and verdict.

The defendant's counsel have argued upon the evidence that the jury do not appear by their findings to have found the proximate cause of the collision at all, and they suggest that the negligence on the part of the defendant, of which there was evidence, was not the ultimate, or final negligence, and therefore was not the proximate cause of the mishap.

The principles governing liability for damage resulting from a collision on land, which is the sequel of negligence on the part of the plaintiff as well as of the defendant, are well settled, although one might suppose from the growing bulk of the judgments dealing with this subject that they still remain obscure. The later pronouncements in this country have been largely concerned with the phrasing of the questions for the jury, and, I fear, tend towards that *nimia subtilitas* which critics, ancient and modern, attribute to the lawyer to his disadvantage. Juries are entitled to have the issues of fact which they are to decide put to them with simplicity and clearness. They are not to have their problems set before them in an abstruse form, or one properly intelligible only to the professional logician—justice may be imperilled by the presence among them of an amateur philosopher. Hence it is, I think, now recognised that

(1) [1916] 2 I. R. 472. (2) [1920] 2 I. R. 258.

the jury should not be asked to find the "proximate cause" of a collision in those, or similar terms. I venture to think that the third question put by Sullivan P. in this case will meet the requirements of most cases of this type, always of course with a proper direction, and, I venture to suggest, with one addition making for clarity. I think it would be an improvement if the question were made to read:—

"3. If the answer to the second question be 'yes,' could the defendant by the exercise of reasonable care have avoided the collision, notwithstanding the plaintiff's negligence?"

The principles governing liability in these cases are, as I have already observed, now settled. The Irish decision, *Scott* v. *Dublin & Wicklow Railway Co.* (1), has been recently given a wider authority by the judgment in *British Columbia Electric Railway Co., Ltd.* v. *Loach* (2). I venture to adopt with great respect the line of approach to these cases stated in the judgment of FitzGibbon L.J. in *Devlin* v. *Belfast Corporation* (3), namely, to begin by examining the duty resting on the respective parties as they came up to, and round the corner—that is to say, their duty one to the other as members of the public using the public highway. The duty, failure in which constitutes contributory negligence, may however be a duty to oneself. Applying the test of duty to the evidence, the jury were entitled on the evidence to find that the plaintiff failed in his duty to give warning of his approach by sounding his horn, and not in any other duty, while there was ample evidence upon which the jury could find that the defendant, after such warning ought to have been given by the plaintiff, could still have avoided the accident if he did not fail in his duty by cutting the corner, and/or travelling at an excessive speed and/or not sounding his horn (he saw the plaintiff when thirty yards away). I do not think that *Loach's Case* (2) is applicable on the facts. We have not to consider a case of clearly antecedent negligence becoming operative after the plaintiff's negligence. We have here evidence upon which it was open to the jury to find that the defendant had the final opportunity to avoid the collision, which it was his duty to avoid if he could, however negligent the plaintiff may have been, and that he failed in that opportunity, and that his failure was the immediate and effective cause of the accident. And we have it admitted that the trial Judge gave proper directions to the jury.

In these circumstances, in my opinion, this application fails, and the motion must be refused, with costs.

O'CONNOR J.:—The main facts of this case may be shortly stated. On a tortuous road with a generally steep gradient and blind turnings the plaintiff and defendant were motoring. The plaintiff was coming down on a motor-bicycle with side-car.

(1) 11 I.C.L.R. 377. (2) [1916] 1 A. C. 719.
(3) [1907] 2 I. R. 437, at p. 453.

Supreme Court. 1925.

LOGAN v. O'DONNELL.

O'Connor J.

The defendant was going up in a motor-car. The collision took place at a blind turning. The plaintiff's speed according to the evidence was about 7 miles per hour—certainly a moderate speed. The defendant's speed was, on his own evidence, at least 15 miles per hour, but he did not think he was going 20 miles an hour. Another witness estimated his speed at from 20 to 28 miles an hour—another at 25 miles. There was certainly evidence on which a jury might find that he was going at an excessive speed for a winding road with blind turnings.

There was also some evidence that the plaintiff was not on the proper side of the road immediately before and at the time the accident happened. There was, if anything, stronger evidence that the defendant for some time before and at the time of the accident was on the wrong side of the road. Neither party sounded his horn when immediately approaching the turn.

In these circumstances the jury had evidence both ways—for the plaintiff and for the defendant — on the question whether the collision was caused by the negligence of the plaintiff or of the defendant. The learned Judge who tried the action left three questions to the jury:—1. Was the defendant negligent? 2. Was the plaintiff negligent? 3. Could the defendant by the exercise of reasonable care have avoided the collision? They were all answered in the affirmative, and judgment was entered for the plaintiff.

No objection was taken to the Judge's charge, and I must therefore assume that he rightly instructed the jury. The defendant's counsel did object to the form of question No. 1, and he asked that the question should be so put that the jury should find in what respect the defendant was negligent—whether (*a*) by driving at an excessive speed; or (*b*) by driving on the wrong side of the road; or (*c*) by not keeping a proper look-out. No other objection was made.

I know of no authority for the proposition that when the issue is negligence the jury should be asked to particularize it; while we have authority *ex relatione* Ronan L.J. in his judgment in *Gaffney* v. *Dublin United Tramways Co.* (1), that Palles C.B., in a case in which he (Ronan L.J.) was counsel, expressed a strong view that this could not be done, saying:—"You have no right to cross-examine a jury."

But I cannot see how it would have availed the defendant to have the negligence, of which he was found to be guilty, particularized, unless he also got particulars in the answer to the third question of his default in exercising reasonable care to avoid the collision. We had it from the learned counsel for the defendant that it was not from any oversight that he omitted to object to the form of the third question. In my opinion the questions as put were unobjectionable.

Other grounds alleged for the motion for a new trial were that the verdict was against the evidence, and the weight of

(1) [1916] 2 I. R., at p. 514.

evidence; but there was ample evidence on which the jury could act.

It was also contended that the facts proved were equally consistent with the injury having been caused by the plaintiff's sole negligence. But the jury found that the defendant could by the exercise of ordinary care have avoided the collision, and I am of opinion that they had ample materials for that finding.

The main argument of the defendant's counsel was that his negligence, if any, was not the proximate or effective cause of the injury. If I were to comment on the words "proximate and effective" I would be only repeating what has been said over and over again by very learned Judges on the use of such and similar words, and their tendency to confusion of thought and misunderstanding. The endless dissertations which they have occasioned have led me, as they have led many others, to the opinion that if juries were asked in contributory negligence cases the simple question: "whose fault was it?" there would be a greater likelihood of getting a sound verdict than in any other way.

In the present case the point is made on the evidence that between the alleged act of negligence of the plaintiff which contributed to the accident and its occurrence there was no negligent act of the defendant, whether of omission or commission, which caused the collision, and that in consequence the affirmative answer to the third question cannot be supported. As I understood the argument, it was: that in order to make a defendant liable for failure to exercise reasonable care to avoid the consequences of the plaintiff's negligence the two events must come in chronological sequence:—first, the negligence of the plaintiff; second, the want of care of the defendant to avoid the consequence; and third, the accident—and that this necessarily involves some new physical fact intervening between the plaintiff's act of negligence and the accident.

Applying that to the present case it means that on the evidence the defendant's negligence consisted of one or other of three things, or perhaps a combination of the three, viz.:—failure to blow his horn, excessive speed, travelling on the wrong side of the road; and that every one of these elements was present before the danger of accident was revealed, and could not possibly be evidence of subsequent want of care to avoid it. I will test the soundness of this argument by an illustration. A motorist travels at reckless speed, so reckless that if another passenger makes a mistake or is guilty of a minor act of negligence which a motorist travelling at a moderate rate may avoid, but which the motorist travelling at a reckless speed cannot, the latter is immune from liability because, when the danger appears, he can do no act to avoid the consequences of his previous recklessness. This argument, based on the necessity for a new physical fact, intervening between the negligent act of the plaintiff and the accident, seems to me to be confuted by the absurdity of the result.

Supreme Court. 1925. LOGAN *v.* O'DONNELL. O'Connor J.

But I consider that this matter has been set at rest by the judgment of the Privy Council, delivered by Lord Sumner, and apparently concurred in by both Lord Haldane and Lord Parker in *British Columbia Electric Railway Co.* v. *Loach* (1), deciding that the principle, that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant by the exercise of care might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from doing that which would have avoided the result of the plaintiff's negligence. The common sense of the decision would seem sufficient to recommend it. It covers the case of excessive speed which frequently makes it impossible to save people from those minor acts of carelessness which many are liable to, and which may be easily avoided by a moderate driver.

We do not know in the present case what particular act or acts of negligence the jury found that the defendant was guilty of. The negligent act may have been excessive speed or keeping the wrong side of the road. Of both there was evidence. Either may have prevented him from being able to avoid the collision once it became apparent, and for that incapacity he may have been himself responsible by his previous negligence. So at least it was open to the jury to find. There was ample evidence which entitled them to do so, and, as they were properly instructed by the learned Judge, I am of opinion that there is no ground for disturbing the verdict.

FITZGIBBON J.:—This is an application on behalf of the defendant that the verdict and judgment in this action, which was tried before the President of the High Court with a common jury, may be set aside, and that a new trial may be ordered, or in the alternative that judgment may be entered for the defendant upon the following grounds:—

1. That the said verdict and judgment was against the weight of evidence;

2. That the said verdict and judgment was against the weight of evidence, and without any evidence to support it;

3. That the learned Judge should have acceded to the defendant's requisition, and left the questions to the jury in the form mentioned in the said requisition, and in accordance with the pleadings in the action;

4. That the facts proved at the trial were equally consistent with the injuries having been caused by the plaintiff's sole negligence;

5. That the defendant's negligence (if any) was not the proximate or effective cause of the injury; and

6. That the injury was caused by inevitable accident.

(1) [1916] 1 A.C. 719.

The claim was for damages in respect of injuries sustained by the plaintiff through alleged negligence of the defendant in the management of a motor-car, and the particulars of the negligence alleged consisted in driving at an excessive speed round a curve and upon the wrong side of the road, and without sounding a horn or keeping a proper look-out.

The defence was a traverse of the alleged negligence; an allegation that the damage was caused solely by the plaintiff's own negligence; and an allegation that "the plaintiff was guilty of contributory negligence." By way of reply, in addition to a joinder of issue, the plaintiff alleged that, assuming negligence on his part, the defendant could by the exercise of ordinary care have avoided causing the damage complained of.

The collision took place between a motor-car driven by the defendant and a motor-cycle, with side-car attached, ridden by the plaintiff, at a point upon the road to Glencullen, about a mile and a half or two miles beyond the village of Stepaside. It is common case that it happened at a sharp bend, which was also a blind bend, upon a fairly steep gradient.

The plaintiff had taken two passengers out for the afternoon, he had dropped them near the place of the accident, and they had gone into a field beside the road. He was to join them, but before doing so he desired to turn his motor-cycle so as to have it in readiness for the return journey. To do this, he drove some distance up the road to a place where he could turn more easily, and he was on his way down hill to his rendezvous when the collision took place between his motor-cycle and the defendant's car, which were travelling in opposite directions. The defendant admitted that his speed was not less than 15 miles per hour at a point where he was approaching a blind corner, and he did not allege that he gave any warning with his horn. The plaintiff swore that the motor-car was on his—the plaintiff's—side of the road, and called two witnesses who swore that the car had passed them not very far from the spot where the collision took place, travelling at a speed which they estimated at from 20 to 28 miles per hour, and that it was then on its wrong side. One of them professed to have "traced the track of the car from the cottage to the place of the accident" (about 300 yards):—"At Cannon's cottage it was three feet over on its wrong side of the road. I went along and at the first corner in the road it was within about two feet of the grass on its wrong side. It then pulled over on its own side, and then it went back again on to the wrong side about three feet from the edge. I could not see any track at the place of the accident." The President then asked the witness what he meant by "three feet over on the wrong side." and the witness explained "that there were only three feet between the track and the wrong side of the road. The tracks were on the wrong side of the road all the way—within about three feet of the wall on the wrong side." It was proved that the road was

Supreme Court. 1925.

LOGAN v. O'DONNELL.

FitzGibbon J.

only 12 feet wide at the place of the collision, and for some distance before it, and as the motor-car was 5 ft. 6 in. broad, this evidence would appear to show that the car was actually travelling along the centre of the road, leaving about 3 feet clear on each side, less by the overhang of the wings.

But, having regard to the description of the route, it is impossible to contend that there was not evidence, if the jury believed it, that the defendant did not exercise proper care in approaching a dangerous corner.

The plaintiff has not appealed against the finding of the jury that he was guilty of contributory negligence, and it would be impossible for him to set aside the verdict upon that issue. Although his speed may have been not more than 7 miles per hour, he admits that he did not sound his horn when approaching the corner, and there was evidence that he was "in the centre of the road," that "his bicycle wriggled across the road and made towards the car," that he "went from one side of the road to the other—he seemed nervous," and that "he had plenty of room to pass." The plaintiff admits that he did not see the car till it was about 4 yards off, from which the jury might reasonably have inferred that he was not keeping a proper look-out, as there was evidence that the cars were visible to one another at a distance of 25 to 30 yards.

There was, therefore, abundant material to justify the finding of the jury that the plaintiff was also guilty of negligence.

The real controversy centres upon the reply of the jury to the third question submitted by the President. "Could the defendant by the exercise of reasonable care have avoided the collision?" to which the jury answered "Yes."

No objection was taken to the form of this question at the trial, nor was there any submission on the part of the defendant that there was no evidence in support of it proper to be submitted to the jury, though this has been strenuously argued here, especially by Mr. Fitzgerald.

Read literally, the question might appear to be only a repetition of the first question, "Was the defendant negligent?" but as the defence of contributory negligence had been raised by the pleadings and was supported by evidence, and as negligence on the part of the plaintiff had been found by the jury in reply to question No. 2, the third question could only have been directed to that defence; and as there was no objection to the question or to the charge of the President, we are bound to assume that the third question was put to elicit the opinion of the jury upon the possibility of the defendant avoiding the consequences of the negligence of which the plaintiff had been found guilty, if they answered question 2 in the affirmative, and that the jury by their answer intended to find that the defendant could, by taking ordinary care, have avoided a collision already rendered probable by the concurrent negligence of the plaintiff and the defendant.

At the close of the plaintiff's case there was no application for a direction, and the short summary I have given of the evidence is sufficient to show that no such application could have been entertained. The defendant then went into evidence to disprove the charge of negligence against himself and to establish his defences of the plaintiff's sole or contributory negligence, and it is upon this evidence that the plaintiff must satisfy the Court that the jury were entitled to find—as they did—that the defendant could, by the exercise of ordinary care, have avoided the consequences of the plaintiff's negligence.

Mr. O'Connor has contended with great energy that he is entitled to rely upon the answer of the jury to question No. 1 as a finding that the collision was caused by the excessive speed at which the defendant approached the dangerous corner, or as a finding that the defendant was on the wrong side of the road, and he submits that if the defendant had in either of these ways incapacitated himself from avoiding any person who might be negligently approaching the corner in an opposite direction, of whose approach he had no warning, the jury were entitled to find that he could, by taking the proper course in the first instance, have avoided the consequences of the plaintiff's negligence, though this was, *ex concessis*, negligence so directly contributing to the accident that without it the accident could not have occurred. And in support of this contention he says that the law was so laid down by the Court of Exchequer in this country in the case of *Scott* v. *Dublin & Wicklow Railway Co.* (1) in the year 1861, but was lost sight of until it was rediscovered by the Judicial Committee of the Privy Council in 1916 in the case of the *British Columbia Electric Railway Co.* v. *Loach* (2). On the other hand, the defendant contends that when contributory negligence has been found as a fact, there must be some new or continuing act or omission by the defendant, *having an opportunity to refrain from acting or to act*, after the negligent act or omission of the plaintiff, in order to render the defendant liable. The first difficulty in Mr. O'Connor's way is that the jury did not find that the defendant's negligence consisted in driving at an excessive speed, or in keeping to the wrong side of the road. The jury may have considered each party to blame for not sounding his horn, or for not keeping a proper look-out, so that the argument founded on self-disablement cannot be applied in this case.

I shall say something about the Privy Council case later, but in *Scott* v. *Dublin & Wicklow Railway Co.* (1), so far from finding Mr. O'Connor's proposition, I find the law stated in the following words—with which I most respectfully concur—by Baron FitzGerald (at p. 400):—"My Lord Chief Baron told the jury, first, that the plaintiff was entitled to recover only in case the injury was caused by the negligence of the defendants; secondly, that the plaintiff was not entitled to recover, notwithstanding the negligence of the defendants, if the plaintiff

(1) 11 I.C.L.R. 377. (2) [1916] 1 A.C. 719.

Supreme Court. 1925.

LOGAN v. O'DONNELL.

FitzGibbon J.

Jemima Scott herself so far contributed to the misfortune, by her own want of ordinary care and caution, that but for such want of ordinary care and caution on her part the misfortune would not have happened. Is not that in direct terms saying that the negligence of the defendants must be the cause, the proximate cause, and the sole proximate cause of the injury? That is the very law laid down by the defendants' counsel. Then there was a third proposition stated by my Lord Chief Baron; that, although the plaintiff Jemima contributed to the misfortune, by her want of ordinary care and caution, that would not disentitle the plaintiffs to recover in this action, if the defendants might, by ordinary care on their part, have avoided, in the occurrence complained of, the consequence of the neglect or carelessness of the plaintiff. As to the law contained in that proposition, there is not, and cannot be, any complaint on the part of the defendants; for it is only putting more strongly the necessity that the default which is relied on as the foundation of the action must be the proximate cause of the injury. The plaintiff may still recover, if her want of ordinary care in avoiding the consequence of the defendants' negligence be not the proximate cause: *that is, in other words, if there intervene a new cause on the part of the defendants. That is the correct law.*"

Scott v. *Dublin & Wicklow Railway Co.* (1) was argued on a bill of exceptions after the jury had found that the defendants had been guilty of negligence, and that the plaintiff had not; and the particular exception with which the learned Baron was dealing in the passage cited above was based upon an assumption by the defendants' counsel that "it was physically impossible for the defendants to have avoided the consequences of the plaintiff's want of care" (2)—a want of care which had been negatived by the jury—and a contention that "the third proposition" was objectionable, not because it was not law, but "as being inapplicable to the present case, and calculated to mislead the jury, as there was no evidence in the case to which the rule could be applied." The Chief Baron indicated (3) several methods by which the defendants might have avoided the consequences of the plaintiff's negligence, if the jury had found that she was negligent, and Baron FitzGerald was "not satisfied" that "there was no evidence of any want of ordinary care on the part of the defendants *after the supposed negligence* of the plaintiff" (4). It must be remembered that the point actually decided in *Scott* v. *Dublin & Wicklow Railway Co.* (1) was that the exceptions to the charge of the Chief Baron at the trial were not well founded. It did not decide, and I do not understand Baron FitzGerald as agreeing, that everything stated in the judgment of the Chief Baron on the argument of the bill of exceptions was good law.

(1) 11 I.C.L.R. 377.
(2) At p. 384.
(3) At p. 395.
(4) At p. 401.

The Chief Baron had refused to direct the jury that there must be some new physical act, irrespective of the continuing original negligence, after the plaintiff's negligent act had intervened, to make the defendants liable. The very continuance of the original negligent act or omission after the plaintiff had put himself in a position of jeopardy would make the defendants liable if, in the circumstances, the defendants could have avoided injuring the plaintiff.

A plaintiff cannot give himself a cause of action by recklessly throwing himself in the path of a vehicle which is being driven at an excessive speed or without a proper look-out, but if the driver of the vehicle becomes or should become aware of the plaintiff's negligence in time to avoid the collision, that knowledge, actual or imputed, imposes on him a new and additional duty to use due care to prevent an accident — to avoid doing an injury to a negligent man. But he must have the power to avoid the accident when the duty arises, and if he cannot do so, he is, in my opinion, not liable because he has failed to perform an impossibility.

The law was stated in terms very similar to those used by Baron FitzGerald by Lord Justice FitzGibbon in 1907 in the case of *Devlin* v. *Belfast Corporation* (1), where, in speaking of "contributory negligence," he says: —"I must summarise the law, to show how vital this distinction"—that is, between a proximate and a remote cause—"is, and I do so in words which I borrow, or adapt, from Sir Frederick Pollock:—The true ground of contributory negligence being a bar to recovery is that it is the *proximate cause* of the mischief. But independent negligent acts of A and B may *both* be proximate in respect of harm suffered by Z, though either of them, if committed by Z himself, would have prevented him from having any remedy for the other. Thus it appears that the term 'proximate' is not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's disability, and it is therefore dangerously ambiguous. Where the negligent acts are *simultaneous*, as in the case of two persons colliding at a street corner, the rule is, that *if the plaintiff could, by the exercise of ordinary care, have avoided the accident, he cannot recover*; but where they are successive, *he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible.* And the ground of both rules is the same — that the law looks to *the proximate cause*; or, in other words, will not measure out responsibility in halves or other fractions, but holds that person liable who was *in the main* the cause of the injury." And then, after discussing the case of a person injured without any fault of his own, he goes on:—"The strict analysis of the *proximate or immediate cause* of the event, the inquiry *who could last have prevented the mischief* by the exercise of due care, *is relevant*

(1) [1907] 2 I. R. 452.

Supreme Court. 1925.

LOGAN v. O'DONNELL.

FitzGibbon J.

only where the defendant says that the plaintiff suffered by his own negligence.''

Next, there is the case of *Radley* v. *London and North-Western Railway Company* (1), in the House of Lords, where Lord Penzance, in moving the allowance of the appeal, says (2):—''The law in these cases of negligence is . . . perfectly well settled and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could *in the result,* by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.'' Lord Penzance shows on the next page what he meant by the words ''in the result'' when he says: ''It is true that in part of his summing-up the learned Judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might *at this stage of the matter* by ordinary care have avoided all accident, any *previous* negligence of the plaintiffs would not preclude them from recovering.'' Lord Cairns concurred ''with every word'' of that opinion, Lord Gordon ''entirely concurred,'' and Lord Blackburn was ''inclined to think that in part of the summing-up the learned Judge did sufficiently ask the proper questions,'' but failed to have an answer from the jury to them.

In *Spaight* v. *Tedcastle* (3), Lord Birkenhead, dealing with the defence of contributory negligence, says: ''To make a defence on this ground it must be shown that the injured party, or those with whom for this purpose he is identified, might, by proper care, *subsequently exerted,* have avoided the consequences of the defendant's want of proper care.'' Finally, in the *Admiralty Commissioners* v. *s.s. Volute* (4), the Earl of Birkenhead L.C. in a judgment with which his successor upon the Woolsack concurred, and which was described by his predecessor in that high office as ''a great and permanent contribution to our law on the subject of contributory negligence,'' expressed his opinion in these words (5):—''Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the *subsequent negligence is the only*

(1) 1 App. C 754.
(2) At pp. 758, 759.
(3) 6 A. C. 217, at p. 226.
(4) [1922] 1 A.C. 129.
(5) At p. 144.

one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party, secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution''—*i.e.*, of both to blame, in which event the plaintiff at common law cannot recover. There is no difference between the rules of common law and Admiralty as to what amounts to negligence causing or contributing to a collision; the only difference is that where contributory negligence is found, the damages are divided in Admiralty, while at common law the plaintiff recovers nothing. It appears to me to follow, by necessary implication, from the passages I have cited, that if it is shown that the injured party might by proper care, subsequently exerted, have avoided the consequences of the defendant's want of care, the defence founded on contributory negligence is established, and, therefore, that if, by looking out, or by sounding his horn, or by doing any other act, the omission to do which the jury in the present case found to be negligence on the plaintiff's part, he could have avoided the consequences of the defendant's negligent method of approaching the corner, he cannot recover, and cannot have recourse to that same negligence, which, *ex concessis,* he might have avoided, as being the proximate cause of the collision. If, on the other hand, the defendant still had an opportunity of avoiding the collision, notwithstanding the plaintiff's negligence, his decision to avail himself of it was the sole cause of the injury. Mr. Beven sums up the effect of the cases to which I have referred, and others, as follows:—''The peculiarity, in the case of contributory negligence, is that it proceeds upon the assumption that both plaintiff and defendant have been guilty of some breach of duty; and the enquiry is limited to which of the two, by exercising ordinary care, *had the last opportunity* of preventing the occurrence.''

There is ample authority for the proposition that to entitle a plaintiff to recover he must prove that the defendant's negligence was the ''entire'' or ''sole'' cause of the injury. The plea of contributory negligence is either an argumentative traverse of the necessary averment that the defendant's negligence was the sole cause of the injury, or a plea in confession and avoidance: *Doyle* v. *Kinahan* (1). If it is treated as a traverse, and is proved, the plaintiff fails. But if it is treated as a plea in confession and avoidance, and the plaintiff pleads, as has been the practice in this country, and as was actually done in the present case, by way of replication or in the nature of a new assignment, that the defendant could by the exercise of ordinary care have avoided the consequence of the plaintiff's negligence, issue is joined upon the question whether that

(1) I. R. 4 C. L. 150, at p. 153.

Supreme Court. 1925.

LOGAN v. O'DONNELL.

FitzGibbon J.

subsequent failure to take due care was or was not the *sole* cause of the injury. This issue is sometimes raised directly by a negative averment in the plea itself, as in *Rattray* v. *Cork and Macroom Railway Co.* (1). If it is found for the plaintiff, he recovers, because he *has* proved that the *sole* cause of the injury was the defendant's omission to take due care not to injure a negligent plaintiff. The cause of action is not the initial negligence, a breach of a general duty to take due care, but a breach of a particular duty quoad an admittedly negligent plaintiff.

If the case of the *British Columbia Electric Railway Co.* v. *Loach* (2) purports to lay down any rule which is in conflict with those which appear to me to have been settled by the cases I have cited; if, as Lord Justice Ronan holds (3), it decides that the plaintiff's negligence is immaterial when the defendant could, "but for his own *antecedent* negligence," have avoided the accident—an interpretation which seems to me to abolish the defence of contributory negligence altogether—I can only say that I prefer to follow the general line of authority reiterated in this country so recently as 1922 by the decision of the late Court of Appeal in *Neenan* v. *Hosford* (4).

A remarkable feature about the case of the *British Columbia Electric Railway Co.* v. *Loach* (2) is that it seems to have been treated throughout as a case in which the jury had found contributory negligence against the plaintiff. Yet the only finding by the jury adverse to the plaintiff, who sued under the British Columbian equivalent of the Fatal Accidents Act, was that the sole negligence which could be attributed to the deceased consisted in "not taking *extraordinary* precautions to see that the road was clear."

It is certainly not the law in this country that the failure to take *extraordinary* precautions constitutes contributory negligence; see, for instance, the judgment of Pigot C.B. and the Court of Exchequer in *Vaughan* v. *Cork and Youghal Railway Co.* (5). "Although the deceased may, to some extent, have contributed to the injury, if he did not so contribute, *by the want of ordinary care,* his personal representative is not disentitled to recover in this action. Neither of these defences states that he contributed to cause the injury, by a *want of ordinary care. Extraordinary caution is not required.*"

It appears to me that judgment should have been entered for the plaintiff in *Loach's Case* (2) upon the findings of the jury, as there was no finding that the deceased man was guilty of anything amounting to contributory negligence. He was only a passenger in a vehicle which was run over at a level crossing; he was not in control of the horse, and I can well understand the view of the jury that to hold him responsible for supervising the conduct of the friend who had given him a lift would be to demand more than that ordinary care

(1) 4 L. R. I. 386.
(2) [1916] 1 A. C. 719.
(3) [1920] 2 I. R., at p. 303.
(4) [1920] 2 I. R. 268.
(5) 12 I.C.L.R. 297, at p. 303.

and caution, the failure to exercise which amounts to negligence. It is also possible that the jury considered that there was no failure to exercise ordinary care in endeavouring to cross in front of a tram-car whose driver, but for a latent defect, of which the deceased could not be aware, would have had no difficulty in avoiding a collision and might reasonably be expected to do so.

I therefore hold that, unless there is evidence from which a reasonable jury might come to the conclusion that the defendant could have avoided the collision after the plaintiff's negligence had made it probable, the answer to the third question should be set aside, and judgment should be entered for the defendant. If there was such evidence the judgment must stand. The defendant's evidence relevant to this question was as follows:—"I was keeping a good look-out. I approached the corner where the accident happened on my correct side. My front left wheel was well in to the left of the road. I saw the cyclist when I got towards the corner. He seemed to be in the centre of the road. He swerved into his own side, and the cycle seemed to swerve out towards the centre of the road again. I turned sharp to the left up on the grass margin. He grazed the front mud-guard and hit the back mud-guard. I had the car stopped then. I had shut off the clutch and put on the brake . . . I saw him about 30 yards away. I cannot estimate his speed. He had plenty of room to pass." On cross-examination: "I think the cyclist was about 30 yards away when I saw him. He swerved into his left-hand side and then swung out again. When he swung out again I saw that a collision was inevitable. I then swung in on the bank. I had momentum enough to do so after declutching, I turned my car sharply to the left . . . I am driving cars for three years. I don't know whether a foot or hand brake is more powerful. I always rely on my emergency brake—a hand-brake. *I did not put on my brake.*"

Now it appears to me that the jury may well have considered that the defendant, in the exercise of ordinary care, should have endeavoured to take the way off his car by the use of the brakes which he did not put on, or by putting on even one of them. He admits having seen the plaintiff 30 yards away, and the parties were approximating at about 11 yards per second. Yet the defendant only declutched, and allowed his momentum to carry him on. The jury might well conclude that an emergency brake is for use in such an emergency, and that to neglect to use it was an omission to take due care, and that by its use the consequence of the plaintiff's negligence, whatever it was, would have been avoided. I am unable to say that there was not evidence upon which a reasonable jury might come to such a conclusion.

I have refrained from discussing the evidence as to the position of the car and the cycle after the collision. No conclusion could be deduced from this evidence except by a jury,

Supreme Court. 1925.

LOGAN v. O'DONNELL.

FitzGibbon J.

and their deductions would depend to some extent upon whether or not they believed the defendant's story that his car had come to rest against the bank before the plaintiff hit him. There is also a considerable conflict of evidence as to the actual distance to which the rear of the car extended across the road.

Mr. Lupton's objection that the President was bound to subdivide the general question of negligence into a number of sub-heads cannot be sustained. The Judge is not bound to subdivide questions, and provided the questions left by him are proper questions and try the issues between the parties, the exercise of his discretion as to the actual form in which they are framed cannot be made the ground for a new trial.

That there was evidence to support each of the findings of the jury, I am quite satisfied.

That there was no such preponderance of evidence against any finding as would justify the Court in setting any of the findings aside as having been against the weight of evidence is, I think, equally clear.

The contention that "the facts proved at the trial were equally consistent with the injury having been caused by the plaintiff's sole negligence" appears to be based upon the language of some of the Lords in the case of *Wakelin* v. *London & South Western Railway Co.* (1), but it has no application to the present case. In that case there was no controversy as to any fact. The question was as to the inference to be drawn from admitted facts. Here, there was conflicting evidence upon almost every material fact, the speed of the defendant, the course taken by his car, which side of the road he was on, upon all of which the jury was the sole tribunal; and lastly, "inevitable accident" is negatived by the findings of the jury, based, as I have endeavoured to show, upon at least some evidence, that each party was guilty of negligence contributing to the accident. To direct a jury that a collision between two motor vehicles coming in opposite directions round a dangerous corner was a mere accident and "inevitable," when each of them was armed with a horn and the driver of neither took the trouble to sound it, would be an unjustifiable exercise of judicial authority. The only branch of jurisprudence in which, so far as I know, the term "inevitable accident" is in common use is in the Admiralty Court, where it was introduced in place of the ancient phrase "*casus fortuitus*," and was defined as an accident "which the party charged could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." It is clear that the present case could not be brought within that definition.

In my opinion the application should be refused, with costs.

Solicitor for appellant: *L. J. O'Neill.*
Solicitor for respondent: *A. Lane-Joynt.*

R.L.S.

(1) 12 A. C. 41.

FRANCIS LYNHAM, PLAINTIFF, *v.* REVEREND MICHAEL BUTLER, DEFENDANT (1).

(1924.—No. 5898.)

Supreme Court.
1925.
May 12, 13.
July 14.

Landlord and tenant—Land purchase—Action for recovery of possession—Expiration of lease—Order declaring the holding to be one to which the Land Act, 1923, applies—Alteration in the relationship of landlord and tenant—Crucial date—Position of tenant—Rights conferred—Estoppel—Land Act, 1923 (No. 42 of 1923), sects. 19, 20, sect. 24, sub-sect. 1, sect. 70, sect. 73, sub-sect. 2.

Sect 24, sub-sect. 1, of the Land Act, 1923 (No. 42 of 1923), passed on August 9th, 1923, provides:—"Subject to the provisions of this Act and notwithstanding anything contained in any other enactment, all tenanted land wherever situated . . . shall by virtue of this Act vest in the Land Commission on the appointed day, in the like manner and with the like consequences as if vesting orders under the Land Purchase Acts had been made on the appointed day in respect thereof in pursuance of subsequent purchase agreements entered into by the Land Commission with the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts, at the price fixed by or under this Act."

M. being tenant for life of certain lands, demised them for the term of her life to the defendant. Upon M.'s death on August 22nd, 1924, the plaintiff, being entitled in remainder in fee-simple, brought an action to recover possession of the lands. During M.'s lifetime the defendant had obtained an order from Wylie J. declaring that the lands constituted a holding to which the Land Act, 1923, applied. "The appointed day" mentioned in sect. 24, sub-sect 1, of the Act had not been fixed.

Held by the Supreme Court (Kennedy C.J. and FitzGibbon J.; Johnston J. dissenting), that lands which, at the date of the passing of the Act, are comprised in a holding within the operation of the purchase and sale provisions of the Act, do not cease to be within those provisions by the happening of an event, such as would, but for the Act, determine the tenancy before the actual vesting of the lands in the Land Commission or the appointment of a day for such vesting under the provisions of the Act.

The first step in the scheme for the compulsory sale and purchase of holdings to which the Act applies is the abolition of rent-paying to the landlord upon the passing of the Act; and the date of that first step is the crucial date for determining the application of the Act to tenanted land. The Act contains no provision for the cancellation of its application in circumstances such as those in the case before the Court, and therefore the change of position brought about by M.'s death was not such as to take the holding out of the operation of the Act, and accordingly the plaintiff was not entitled to an order for possession.

Held further, that it followed from the order of Wylie J. that the holding would vest automatically in the Land Commission as tenanted land.

Decision of Sullivan P., [1925] 2 I.R. 82, affirmed.

APPEAL by the plaintiff from an order made by Sullivan P. on March 2nd, 1925, refusing an order for possession of certain premises.

(1) Before KENNEDY C.J., and FITZGIBBON and JOHNSTON JJ.

Supreme Court. 1925.

LYNHAM v. BUTLER.

The facts are stated in the report of the case in the Court below, *ante*, page 82, and also in the judgment of Kennedy C.J.

Sullivan P. held that the statutory rights conferred, and the liabilities imposed, on the tenant of a holding to which the Land Act, 1923 (No. 42 of 1923), applies, are unaffected by the expiration of the tenancy before "the appointed day," and that the provisions of the Act deprived the plaintiff of any right to recover possession of the lands in question.

Leonard K.C. and *Overend K.C.* (with them *Marnan*), for the appellant:—

The owner's right to recover possession on the cesser of the tenant's interest before "the appointed day" is not taken away by the Land Act, 1923 (No. 42 of 1923). The rights claimed by the defendant are given only to persons who are tenants on "the appointed day." Two classes of rights are given by the Act:—(*a*) persons who were tenants at the date of the passing of the Act (August 9th, 1923) are given certain rights as regards arrears of rent and payment in lieu of rent until "the appointed day": sects. 19 and 20; and (*b*) all tenanted land is to be vested in the Land Commission on "the appointed day," in the like manner and with the like consequences as if vesting orders under the Land Purchase Acts had been made on "the appointed day" in respect thereof in pursuance of subsequent purchase agreements entered into by the Land Commission with the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts: sect. 24, sub-sect. 1. Apart from his rights as regards arrears of rent and payment in lieu of rent, the tenant is, in the interval between the passing of the Act and "the appointed day," in the same position in relation to his landlord as if the Act had not been passed. "The appointed day" has not been fixed, and the lands have not yet vested in the Land Commission.

There may be holdings which, although within the Act at the date it was passed for the purposes of arrears of rent and payment in lieu of rent, will not vest on "the appointed day": see sect. 26, sect. 28, sub-sect. 1, and the First Schedule, Part II, clause 3. In every case where lessees have been protected the statute has expressly so provided, *e.g.*, Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), sect. 21; Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), sect. 1; Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), sect. 3.

In the Land Act, 1923, "the appointed day" is the crucial date.

Jellett K.C. and *G. W. Walker K.C.* (with them *Malony*), for the respondent:—

The crucial date is that on which the Act was passed. This holding was tenanted land on that date, and the tenant of every

holding of that class will be deemed to have entered into a purchase agreement to buy it. The procedure under sects. 19 and 20 is preliminary to the ultimate vesting of the lands. A similar question arose under the Land Law (Ireland) Act, 1881, and the Land Law (Ireland) Act, 1896, and it was decided in *Nelson* v. *Headfort* (1), and in *Gaffney* v. *Fetherstonhaugh* (2), that the crucial date in the case of each statute was that of the passing of the Act.

Here we are dealing with legislation of a compulsory character which vests the land in a public department; and it would be curious if the Legislature, having deprived the landlord of the right to recover rent, left him with other rights which would make the Act inoperative, such as the right to recover possession from the tenant, as is claimed by the appellant here. Further, this action is an attempt to reopen what has been already decided by the order of Wylie J. That order operates as an estoppel.

Leonard K.C., in reply:—Express provision is required to detract from the rights of ownership.

KENNEDY C.J.:—

This is an appeal from a judgment of the President of the High Court in favour of the defendant on the trial of the action. The action was brought to recover possession of the house, offices, and lands of Mount Seskin, containing 668 acres, 1 rood and 10 perches, situate in the County of Dublin, and also possession of certain lands of Mount Seskin known as the Causeway Farm, containing 9 acres and 13 perches, lately in the occupation of James Shaughnessy, as tenant, under the Land Judge of the late High Court of Justice, and also to recover possession of the shooting and all other ground rights attached to the said lands. The matter in issue in the action and in this appeal is entirely a question of law.

The facts (which are common case) are shortly as follow:—One, Francis Lynham, was formerly seised of all the hereditaments and premises, the subject of the action, for an estate in fee-simple in possession. He died in the year 1866, having settled the said lands and hereditaments by his will upon certain uses and trusts, under which, in the events that happened, his daughter, Mary, then the wife of Michael C. Macinerney, was, on and prior to the 30th day of July, 1920, seised as tenant for life of the said hereditaments and premises, and continued so seised until her death, which took place on the 22nd day of August, 1924. Upon the death of the said Mary Macinerney, the plaintiff, who, in the events that happened, was entitled in remainder under the settlement made by the said will, became seised of and absolutely entitled to the premises in fee-simple.

(1) 18 L. R. Ir. 407. (2) [1900] 2 I. R. 417.

Supreme Court. 1925.

LYNHAM v. BUTLER.

Kennedy C.J.

Mary Macinerney, by an indenture of lease dated the 30th July, 1920, demised the said lands and hereditaments to the defendant in the action for the term of her own natural life, and the defendant was, at the date of her death, in possession of the premises under the said lease. The plaintiff's claim is that, upon the death of the said Mary Macinerney, the said lease of the 30th July, 1920, determined, and that he (the plaintiff) thereupon became, by virtue of his title which I have shortly stated, entitled to recover clear possession of the said lands and hereditaments from the defendant. The defence to the action depends entirely upon the Land Act, 1923 (No. 42 of 1923), and for the purposes of that defence, the following facts are relevant and important. The Act was passed by the Oireachtas, on the 9th day of August, 1923. Upon an application made by the defendant, pursuant to the provisions of the Act of 1923, an Order was made by the Judicial Commissioner, Mr. Justice Wylie, on the 7th day of February, 1924, in the Court of the Irish Land Commission, whereby it was declared that the lands demised by the lease of 30th July, 1920, constituted a holding to which the Land Act, 1923, applied. The respondent on the hearing of the said application was the said Mary Macinerney, the lessor in the lease. The present plaintiff, however, appeared before the Judicial Commissioner on the hearing of the application by solicitor and counsel. So far as the matter of sale under the Land Act, 1923, is concerned, no day has yet been fixed by the Land Commission as "the appointed day" for the vesting of the lands in the Land Commission. The net question, therefore, is whether lands, which, at the date of the passing of the Land Act, 1923, are comprised in a holding within the operation of the purchase and sale provisions of the Act, cease to be within these provisions by reason of the happening of an event such as would, but for the Act, determine the tenancy before the actual vesting of the lands in the Land Commission, or the appointment of a day for such vesting, under the provisions of the Act. There is also the further question to which I will refer later, namely, whether the declaration made by Mr. Justice Wylie on the 7th of February, 1924, operates as an estoppel upon the plaintiff's claim to recover possession in this action.

The Act of 1923, the latest—if not the last (as its intention appears)—contribution to the two streams of legislation ameliorative of the position of tenants occupying agricultural land in Ireland, has brought the two streams, the Land Law (Ireland) Acts (which modified the relation of landlord and tenant while maintaining the existence of the tenancy), and the Land Purchase Acts (which induced and facilitated the voluntary sale by the landlord of his estate to the tenant), together with the small tributary stream known as the Congested Districts Board (Ireland) Acts (enabling compulsory acquisition of land in certain circumstances), to merge confluent into a new single channel

in which the identity of the original streams has been lost for good and all. The new course is compulsory purchase by operation of the Act.

The process by which the Act operates is simple and clearly directed to an expeditious and final achievement of its purpose. The central provision round which the whole operation turns is the vesting effected by sect. 24, sub-sect 1. It is there enacted that—"subject to the provisions of this Act and notwithstanding anything contained in any other enactment, all tenanted land wherever situated and"—all the untenanted land therein described, but with which we are not immediately concerned—"shall by virtue of this Act vest in the Land Commission on the appointed day." Sub-sect. 2 of the same section exempts from its operation seven classes of land, but the present case does not fall within the description of any of these exempted cases whether regarded as of the date of the passing of the Act or as of the present time. The first and second of these cases are cases of tenanted land and expressly refer to the date of the passing of the Act as a crucial date in determining the application of the Act. The third, fourth, and fifth cases refer to untenanted lands, but the marked use of the present tense of the verbs in these clauses is to be noted. The sixth case deals with public lands, while the seventh, dealing with "glebes," is the only case expressly mentioning a future time, and that by reference to a definition in the statute there cited, the Glebe Lands, Representative Church Body, Ireland, Act, 1875.

The Act therefore vests in the Land Commission all tenanted land except in the case exempted by sub-sect. 2 of sect. 24. In order to determine the extent of the application of the Act, we must turn to sect. 73, sub-sect. 2, which defines "tenanted land" as meaning "land held under any contract of tenancy other than a fee-farm grant, or lease renewable for ever for lives or years, or lease for a term of years of which sixty or more are unexpired at the date of the passing of this Act, or a letting for the purpose of temporary depasturage, agistment or conacre, or for temporary convenience, or to meet a temporary necessity."

Abuse of the Act is guarded against by a special proviso with regard to contracts of tenancy made after the first day of September, 1922.

All "tenanted land" so defined, subject to the exceptions to which I have referred, is by the operation of the Act transferred from the landlords and vested in the Land Commission, to be dealt with by way of sale to the tenants or otherwise as the Act prescribes. The actual vesting in the Land Commission does not, however, take effect as of the date of the passing of the Act. The vesting is to take place on "the appointed day" as if vesting orders under the Land Purchase Acts had been made on the appointed day in pursuance of "subsequent purchase agreements" made between the Land

Supreme Court. 1925.

LYNHAM v. BUTLER.

Kennedy C.J.

Commission and the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts at a price fixed by or under the Act.

"The appointed day" is defined by sect. 70 to mean such day or days as may be fixed by the Land Commission, and power is given to fix different days for different provisions and different purposes of the Act and for different holdings.

The expression "subsequent purchase agreements" is defined by sect. 73, sub-sect. 1, of the Act to mean agreements entered into, or deemed to have been entered into, by or with the Land Commission on or after the date of the passing of the Act. It is not unimportant to observe that the scheme of sect. 24, sub-sect. 1, is a clear sequence—a notional purchase agreement made between the Land Commission and the landlord on or after the date of the passing of the Act, followed by a vesting of the land in the Land Commission on the appointed day.

The appellant's case depends entirely on the existence of an interval of time between the passing of the Act and the appointed day for vesting the lands in the Land Commission, an interval of time during which, as he contends, the landlord (I use that convenient term to describe the owner of an interest saleable under the Land Purchase Acts) remains master of his estate and the tenant assured of no greater interest than he would enjoy if the Act had not been passed. The present case is one of a tenancy depending under the contract upon the vicissitude of a human life. The contention stated baldly is that, as regards compulsory transfer to the Land Commission, the status and rights of lands, of tenancy, and of parties to the tenancy, are to be determined at the time of vesting, up to which point of time there remains—so it is argued—the possibility of arresting the operation of the Act, as here, by the fall of a life, the duration of which was the term of the tenancy existing when the Act passed.

In my opinion, this contention is not only without explicit basis of any kind in the Act, but it is in direct conflict with the clear scheme of statutory expropriation of landlords which has been enacted. The blotting out of the landlord's estate does not wait upon the appointed day, then to be accomplished *uno ictu*. There are several blows of the axe in the process. The first was delivered by and at the passing of the Act itself. With the enacting of sects. 19 and 20, the axe fell on rent in the case of every holding to which the Act applies. Thereafter rent is not payable by the tenant or recoverable by the landlord. The tenant is to compound with the Land Commission for the arrears then due by him, and until the appointed day, that is to say, until the land vests in the Land Commission, he is to make certain payments to the Land Commission in lieu of rent. The landlord on his part, having no further claim upon the tenant, is to look to the Land Commission for the composition in respect of the arrears due to him by the tenant, and for

payment in lieu of rent up to the appointed day—that is to say, until he becomes entitled to receive the interest on the Land Bonds representing the purchase price. The final and complete determination of the relationship of landlord and tenant, in so far as that relationship is expressed in terms of rent, is shown in the clearest way by the prohibition of both applications and agreements to fix judicial rents under the Land Law Acts (sect. 64), which involves also the disappearance of fixity of tenure by way of statutory tenancies. That section (sect. 64) is expressly made to take effect on the passing of the Act.

The second stroke of the axe falls when the estate of the landlord, such as remains after the right to rent has been lopped off, becomes the subject of a notional agreement for purchase under sect. 24, sub-sect. 1, and the Land Commission becomes entitled to the equitable interest in the landlord's estate. That is deemed to have taken place at some indeterminate point of time between the passing of the Act and the vesting on the appointed day.

The third and last stroke is the operation of vesting the attenuated remains of the landlord's interest, his legal estate, in the Land Commission on the appointed day. This is effected by virtue of the Act without vesting order or other process.

These are the steps of a connected series in a single scheme, a scheme for the compulsory sale and purchase of the holdings to which the Act applies. The first and fundamental step in that scheme is the abolition of rent-paying upon the passing of the Act. The date of that first step must of necessity be the crucial date for determining the application of the Act. It is an irrevocable step. The Act contains no provision whatever for its reversal or cancellation in any such circumstances as we have had to consider in the present case. There is not, for instance, any provision in the Act of 1923 analogous to sect. 35 of the Irish Land Act, 1896.

It seems to me clear beyond doubt that the date of the passing of the Act is the crucial date for ascertaining the application of the Act to tenanted land, and that the Legislature had this principle definitely in view is to my mind manifest. Take, for instance, sect. 40, sub-sect. 4. How could the appellant's argument stand if the Land Commission had published a final list including this holding during Mrs. Macinerney's life-time, but had not fixed the appointed day before her death? Where is the conclusiveness of the final list if, as the appellant contends, the Land Commission cannot then fix an appointed day?

For these reasons I am clearly of opinion that the appellant's claim fails. It is therefore not necessary that I should go into the question of estoppel at length. Suffice it to say that Wylie J., the tribunal appointed by the Act, determined the status of the holding on a hearing at which the appellant appeared and

Supreme Court. 1925.

LYNHAM v. BUTLER.

Kennedy C.J.

was represented by counsel. The learned Judicial Commissioner held that the holding was one to which the Act applied. In my opinion it follows from that decision that the holding will vest automatically in the Land Commission as tenanted land. I do not think in the circumstances that it is necessary for me to consider whether the appellant was estopped by that decision from arguing here that a change of status occurred upon the death of Mrs. Macinerney. I should require more argument to convince me that he is so estopped. In my opinion, he has wholly failed to establish his contention that such a change of position was brought about by Mrs. Macinerney's death as to take the holding out of the operation of the Act, and this appeal should be dismissed with costs.

FITZGIBBON J :—

The Chief Justice has permitted me to read the judgment which he has just delivered, and I concur in every word of it.

JOHNSTON J. :—

I regret that I am obliged to take a different view; but as my opinion will have no practical effect, and as the special facts in this case are not likely to arise often again, it is unnecessary for me to set out my reasons at any great length. I am unable to find anything in the Act which affects the right of a person in the position of the plaintiff to recover this land in the interval between the passing of the Act and "the appointed day." The effect of the Act as to vesting does not take place till the appointed day; and similarly it is on the appointed day that the agreement to purchase is "deemed" to have been entered into by the tenant. It seems to me that if the defendant here is right, we have arrived at a result which was not achieved by any previous compulsory land purchase code. Before any vesting of the lands has taken place: before any agreement to purchase, whether actual or imputed, has been entered into: before any notice corresponding to a notice to treat under the Lands Clauses Act has been served: before any public notice has been published similar to the notice provided for by the Evicted Tenants (Ireland) Act, 1907, it is to be considered that the mere shadow of coming events is sufficiently potent to effect the change of ownership for which the defendant's counsel contends, vesting the plaintiff's lands in a person with whom he has not, and never had, any privity, and of whom he knows nothing.

A very similar problem arose after the rent-fixing clauses of the Land Law Acts began to operate. What was to happen to a judicial tenancy, created as against a limited owner, when the life-tenancy had come to an end, and the remainder-man

had entered into possession of land as owner? In *Peyton* v. *Gilmartin* (1) it was decided that a statutory term created during the interest of a life-tenant (the landlord) in respect of a holding in which a tenancy of a holding from year to year had been created by a previous life-tenant ceased with the determination of the life-tenant's estate. This principle was upheld by the Court of Appeal in *Monaghan* v. *Hinds* (2), in which case FitzGibbon L.J. said (3): "It is not for us to affect the property of third parties without express legislation to justify such a course." Accordingly, in the following year, the Legislature provided expressly that tenancies to which the Land Law Acts otherwise applied should not be determined by the cesser of the interest or possession of a limited owner who might have created it. (Land Act, 1896, sect. 10.)

The order of Wylie J., made at a time when Mrs. Macinerney was yet alive, and the lease made by her to the defendant, a subsisting one, was, of course, quite right, just as was the order fixing a fair rent in *Peyton* v. *Gilmartin* (1). The state of affairs on which the plaintiff's case depends came subsequently into existence, and the order of Wylie J., which is merely a judicial recognition of the fact that the holding was tenanted land to which the Act applied, cannot put the defendant into a more secure position than does the Act itself.

Solicitors for the appellant: *Daniel Purcell & Son.*
Solicitors for the respondent: *Justin M'Carthy & Co.*

C.L.

(1) 28 L. R. Ir. 378. (2) [1895] 2 I. R. 689. (3) At p. 697.

High Court. 1925. July 17, 20.

IN THE MATTER OF AN APPLICATION FOR COMPENSATION FOR CRIMINAL INJURY TO PROPERTY AND OF THE DAMAGE TO PROPERTY (COMPENSATION) ACT, 1923; THOMAS LEWIN, APPLICANT, *v.* MINISTER FOR FINANCE, RESPONDENT (1).

Malicious injury—Buildings totally destroyed—Compensation—Principle of assessment—Market value—Special adaptability of lands—Absence of "reinstatement condition"—Destruction of machinery—Assessment of compensation—Practice—Appeal from Circuit Court to High Court—Principles applicable to the hearing—Damage to Property (Compensation) Act, 1923 (*No.* 15 *of* 1923), *sect.* 6, *sect.* 10, *sub-sects.* 1, 5, 13, 14—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 61, 62.

The High Court, on hearing an appeal under sect. 61 of the Courts of Justice Act, 1924, from an award of compensation made by a Judge of the Circuit Court under the Damage to Property (Compensation) Act, 1923, should act on the principles applicable to an appeal from the decision of a Judge in an action tried without a jury.

The "market value" of a destroyed building (as defined by sect. 10, sub-sect. 13, of the Damage to Property (Compensation) Act, 1923) was assessed by the High Court (in default of evidence of an actual price paid recently for the premises) by estimating the net rent that a tenant would pay, and capitalising this amount at a number of years' purchase, having regard to the particular class of property, the district in which it was situated, and all the relevant considerations.

Compensation for a destroyed dwelling-house and out-offices, in respect of which no "reinstatement condition" had been attached by the Judge of the Circuit Court, was, on appeal, fixed by the High Court at the "market value" of the premises, being the maximum amount allowable by sect. 10, sub-sect. 5, of the Act.

Method of assessment of compensation for agricultural machinery maliciously destroyed considered.

APPEAL from an award of the Judge of the Circuit Court for the Western District (Circuit No. 4).

The appeal was to two Judges of the High Court, pursuant to sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924). Thomas Lewin, the applicant, claimed compensation under the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), for the burning of his mansion-house and out-offices, Castlegrove House, Co. Galway, also for the farm buildings and lodges, the household furniture, and agricultural and other machinery.

The applicant was owner in fee-simple of the mansion-house, which he occupied, and of 800 acres of land, which he farmed. He had saw-mills and valuable agricultural machinery on the lands. The house and out-offices were maliciously burned on the 26th July, 1922. The application for compensation was heard by Judge Wyse Power at Galway on 24th October, 1924, who awarded £12,985 in respect of the buildings, £10,000 in respect of the furniture, and £4,173 in respect of the agricultural machinery—in all, £27,158. The applicant did not apply to have a "reinstatement condition" attached to the decree under the provisions of sect. 10 of the Damage to Property (Compensation) Act, 1923. From the award of the Circuit Judge the Minister for Finance appealed.

(1) Before SULLIVAN P. and HANNA J.

Costello K.C. and *Bewley*, for the appellant:—

The amount allowed by the Circuit Judge in respect of furniture is not disputed. The awards for the destruction of the buildings and the agricultural machinery are excessive. As no "reinstatement condition" has been attached to the decree, the compensation cannot exceed the amount by which the market value of the buildings was reduced by the injury: sect. 10, subsect. 5, of the Damage to Property (Compensation) Act, 1923. The applicant's valuer, Mr. Sarsfield, in taking as a basis the aggregate value of the property, was wrong; while the respondent's calculation by Mr. Adam of the market value based on the utmost annual value or rent was correct. The fact that an industry was carried on on the premises was not an element in ascertaining the value. "Market value" in sect. 10 is defined as meaning "the price which the property might be expected to fetch if sold by a willing seller at the price prevailing in a free market for such property at the time of the award."

S. L. Brown K.C. and *Price K.C.* (with them *C. Maguire*), for the respondent:—

There is no jurisdiction to re-hear this case. An appeal under sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924), is not a re-hearing (1). The Court is bound by the evidence given before the Circuit Judge, and the award should not be varied unless the method of assessment was arrived at on a wrong basis. Here the basis was that of replacement. The figures of the valuer for the Minister for Finance were based on the prices in the year 1924 to replace the destroyed articles, having regard to their actual value, and such figures are not correct. The out-buildings possessed a commercial value. The residence was

(1) Courts of Justice Act, 1924 (No. 10 of 1924), sect. 61:—"Save as in this Act is otherwise expressly provided, an appeal shall lie from any judgment or order of the Circuit Court in civil cases to two judges of the High Court sitting in Dublin. If such two judges agree in their opinion, their decision shall be final unless they certify that their decision involves a question of law or fact of such importance as to be fit to be the subject of an appeal to the Supreme Court, in which case an appeal shall lie at the instance of any party from the decision of such two judges to the Supreme Court. If such two judges differ in their opinion, they shall affirm with costs the judgment or order appealed against, and an appeal shall lie at the instance of any party from such affirmance to the Supreme Court. The appeal under this section shall be on law and fact or upon either, save that where the appeal from the exercise by the County Court of any particular statutory jurisdiction transferred by this Act to the Circuit Court is expressly or by implication limited by statute to an appeal on questions of law, the appeal from the exercise of that jurisdiction by the Circuit Court shall be similarly limited."

Sect. 62:—"Such appeal shall be grounded on the report of an official stenographer, but the court which hears such appeal may if it think fit admit fresh evidence, either oral or on affidavit, and may refer any matter arising on the report of the official stenographer to the Circuit Judge for his observations thereon and may either order a new trial or enter such judgment, in the case, as to the Court shall seem fit."

High Court. 1925.

LEWIN v. MINISTER FOR FINANCE.

worth commercially £1,000 per annum, taking into account the saw-mills and farm. Sect. 10, sub-sect. 14, should be regarded when estimating the market value of the buildings. That sub-section provides that "in any case in which any land, garden, or curtilage was commonly enjoyed with any building so that such building would not ordinarily have a market value apart from such land, garden or curtilage, the Judge in estimating the market value of the building shall give such consideration to that state of facts as he thinks reasonable." The applicant is entitled to compensation for the loss he has sustained, subject only to the limitation imposed by sect. 10, sub-sect. 5, owing to the absence of a "reinstatement condition."

Cur. adv. vult.

July 20.

SULLIVAN P.:—This case came before us as an appeal by the Minister for Finance from a decree of Circuit Judge Wyse Power, dated the 24th November, 1924, awarding to Mr. Lewin a sum of £27,158 as compensation for malicious injuries committed in July, 1922. The property injured comprised—1, a dwelling-house, out-offices, and farm buildings; 2, lodges; 3, household furniture; and 4, agricultural and other machinery.

No question was raised on the appeal as regards the sums awarded as compensation for the injuries to the lodges and household furniture, but the sums awarded as compensation for the damage done to the dwelling-house, out-offices, and farm buildings, and to the agricultural and other machinery were challenged as excessive.

Mr. Brown, on behalf of the respondent, contended that this appeal is not a re-hearing, and that if there was evidence before the Circuit Judge on which a jury might reasonably act we should affirm the decision of the Circuit Judge. Having regard to the provisions of sect. 61 of the Courts of Justice Act, 1924, we cannot accept that contention (1). That section provides that an appeal from the decision of a Circuit Judge may be on law and fact, or upon either. In hearing such appeals the Court should act on the principles applicable to an appeal from the decision of a Judge in an action tried without a jury. These principles are now well settled, and need not be re-stated: see the judgment of Holmes L.J. in *Aberdeen Glen Line Steamship Co.* v. *Macken*; *The s.s. "Gairloch"* (2); and the speech of the Lord Chancellor, Viscount Cave, in *Cooper's Case* (3).

Acting on these principles, we have considered the evidence given in the present case, the official stenographer's report of which is before us, as prescribed by sect. 62 of the Courts of Justice Act, 1924 (4).

(1) Sect. 61 is set out in the note on the preceding page.
(2) [1899] 2 I. R. 1, at p. 18.
(3) [1922] 2 I.R. 214.
(4) Sect. 62 is set out in the note on the preceding page.

By sect. 6 of the Damage to Property (Compensation) Act, 1923, the right to compensation is limited to compensation for the actual damage done to the property, and does not extend to consequential loss, or to the loss of the use of the property, or to the loss of mere pleasure or amenity. The compensation to be awarded in the present case in respect of the damage done to the dwelling-house, out-offices, and buildings is further limited by sect. 10, sub-sect. 5, which provides that such compensation shall not exceed the amount by which the market value of the buildings was reduced by the injury. As in this case the buildings in question were destroyed, there is now no market value for them, and the limit of compensation is therefore the market value of the destroyed buildings.

"Market value" is defined by sect. 10, sub-sect. 13, as "the price which the property might be expected to fetch if sold by a willing seller at the price prevailing in a free market for such property at the time of the award." I am not prepared to accept the proposition that the words "at the time of the award" are, having regard to the context, necessarily equivalent to "at normal times."

In assessing the market value I accept the method adopted in this case by Mr. Adam, viz.:—to estimate the net rent that a tenant would pay, and to capitalize this at a number of years' purchase, having regard to the particular class of property, the district in which it is situated, and all other relevant considerations. In the present case there was evidence that the respondent was engaged in farming on an extensive scale, and that the out-buildings were particularly suitable for that purpose, but out of all proportion to an ordinary country residence. That is a matter which should be considered in fixing the rent and the price, as affecting the value of the dwelling-house and buildings to prospective tenants or purchasers intending to use the lands in the same manner as the respondent did. It may tend to increase the estimated rent or price as adding to the value of the house and buildings, or to diminish it as limiting the number of prospective tenants or purchasers. I agree with the learned Circuit Judge that little assistance in fixing the market value can be derived from the estimated cost of reconstruction, but I think he attached too much importance to the applicant's estimate of £1,000 as the commercial value of the dwelling-house as used in connection with his business. This was, at best, but an estimate which, admittedly, could not be exact.

We have considered the entire evidence, and have come to the conclusion that we should estimate the net rent of the house and out-buildings at £520, and the number of years' purchase at 17. On these figures the market value is £8,840. This is the limit of compensation under sect. 10, sub-sect. 5, and we see no reason why the respondent should not get the maximum compensation in this case. We therefore fix the compensation for the house and out-buildings at that figure.

High Court. 1925.

LEWIN v. MINISTER FOR FINANCE.

The compensation for the destruction of the agricultural and other machinery we fix at £3,000.

HANNA J.:—As regards the agricultural machinery, in my judgment the applicant is only entitled to the value of the articles at the date of the destruction. This would be fairly arrived at by taking cost price less depreciation. I have scrutinised the claim for these articles prepared by the valuers, and the claim is unsatisfactory, and the depreciation allowed inadequate, having regard to the general character of the articles. The figure allowed comes very close to the claim based on new modern prices. I am also of opinion that the Court should take into consideration that the prices of such articles have been falling, and if they had to be replaced now they could be obtained at a much smaller figure. Having regard to these considerations, in my judgment the amount of the claim £4,596 should be reduced by at least 30 per cent., and a sum of £3,000 awarded for the agricultural machinery and implements.

The use of the word "enjoyed" in the section serves to indicate that the Legislature intended that the market value should be assessed having regard to "amenities" rather than "utilities."

The result of the section is that when, in a case of total destruction, there is no "reinstatement clause" imposed, the actual injury to the building is arrived at by the standard of the market value of the premises at the time of the making of the award, having regard to the amenity of such lands or grounds usually "enjoyed," as in this case, with the premises as a residence.

"Market value" is a fact well known to valuers, and definite methods of proof are always available, though of varying degrees of weight as evidence. The only satisfactory method is that adopted by Mr. Adam. In default of evidence of an actual price paid recently for the premises, he fixes a reasonable annual rent, and gives a certain number of years' purchase, having regard to all the circumstances. The method of the applicant's valuer is quite illusory, and may be misleading. He fixes market value as the value of the house as an adjunct to the farm. This may be a matter to be taken into consideration, but, as a reliable guide to market value, it fails.

But there is some evidence of a special market value, and we can, and should, apply the principle laid down by Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1), and by Rowlatt J. in *Sidney* v. *North-Eastern Railway Co.* (2), viz.:—that where a special adaptability for some particular purpose exists, which, amongst possible purchasers goes towards fixing the market value, it is an element of value to be taken into consideration, but balanced by the fact that this

(1) [1909] 1 K.B. 16, at p. 31.

(2) [1914] 3 K.B. 629.

very special character may limit the competition to that special market, or class of purchasers.

Taking Mr. Adam's method, and having regard to the special facts, in my judgment a fair normal annual rent for this place as a residence, without any special amenities such as fishing, shooting, or other sports, would be £520. Mr. Adam says the highest number of years' purchase in recent times is 16⅔. I agree to the figure of 17 years, and in my judgment the market value of the destroyed house should be fixed at £8,840.

Each party shall bear his own costs.

Price K.C. asked for liberty to appeal pursuant to the provisions of sect. 61 of the Courts of Justice Act, 1924. That section provides that if the two Judges who hear an appeal from an order of the Circuit Court agree in their opinion, their decision shall be final unless they certify that their decision involves a question of law or fact of such importance as to be fit to be the subject of an appeal to the Supreme Court, in which case an appeal shall lie at the instance of any party from the decision of such two Judges to the Supreme Court. Important questions of law are involved in this case as to the method of assessment of the compensation payable under the Damage to Property (Compensation) Act, 1923, and large amounts of compensation are under consideration.

THE COURT refused the application.

Solicitor for the appellant: *M. A. Corrigan.*
Solicitor for respondent: *H. Concannon.*

H. H.

Supreme Court.

1925.

April 22.

IN THE MATTER OF J. E. DOHERTY, A BANKRUPT (1).

Mortgage—Mortgaged property destroyed by fire—Insurance by mortgagor—No covenant to insure—Application of insurance moneys—Rights of mortgagee—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *sect.* 23, *sub-sects.* 3 *and* 4.

Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 19, sub-sect. 1 (ii), a mortgagee, where the mortgage is made by deed, is empowered to insure the mortgaged property against loss or damage by fire.

Sect. 23, sub-sect. 2, provides: "An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):—

. . . . . .

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorised to insure."

Sub-sect. 3: "All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received."

Sub-sect. 4: "Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage."

The premises of a bankrupt, subject to two mortgages, and insured by himself, were destroyed by fire, and the money due in respect of the insurance was received by the Official Assignee. In the first mortgage deed there was a covenant to insure the mortgaged property and keep it insured; but the second mortgage deed did not contain such a covenant.

A finding by the Chief Registrar that the first mortgagee was entitled to require that the insurance money be applied in reinstating the premises or in payment of her mortgage debt, and that the second mortgagee was entitled to require the money to be applied, subject to the rights of the first mortgagee, in payment of his mortgage debt, was affirmed by O'Shaughnessy J.; and from so much of that decision as affected the rights of the second mortgagee, the Official Assignee appealed.

Held (affirming O'Shaughnessy J.), that the money received "on an insurance" which a mortgagee may require, under sub-sect. 4 of sect. 23, to be applied in or towards discharge of the money due under his mortgage is not limited as in sub-sect. 3 to money received on an insurance effected under the mortgage deed or under the Act.

APPEAL from an order made by O'Shaughnessy J. on February 6th, 1925, confirming the report of the Chief Registrar in Bankruptcy in the matter.

The bankrupt was possessed of certain premises in Kilcormac, King's County, consisting of licensed premises, certain other adjoining premises, and a weigh-bridge. He carried on business as a publican, grocer, draper, hardware and provision merchant.

(1) Before KENNEDY C.J., and O'CONNOR and FITZGIBBON JJ.

The premises and the stock and furniture therein were destroyed by fire on January 11th, 1924. The premises and stock had been insured by the bankrupt, and the Official Assignee had received in respect of such insurance on the buildings the sum of £1,700, and in respect of the insurance on the fittings the sum of £300.

The premises were subject to two mortgages effected by the bankrupt. The first mortgage was dated February 27th, 1919, and under it £500 principal and £90 interest were due to Mrs. Bessie Kirley, the mortgagee. That mortgage contained a covenant by the mortgagor to insure the premises. On foot of the second mortgage dated January 5th, 1921, there was due to William M'Fadden, the mortgagee, £1,000 principal and £153 6s. 8d. interest. The second mortgage did not contain any covenant as to insurance.

Pursuant to an order made on October 7th, 1924, by Meredith J., the matter was referred to the Chief Registrar to investigate and report as to:—(*a*) who were the mortgagees or chargeants in the matter; (*b*) the amount due to each; (*c*) the nature and the amount of security held by each; (*d*) the priorities of such mortgagees or chargeants.

Having found that the mortgagees were as already mentioned, the Registrar in his report stated:—

"I find that the said Bessie Kirley under and by virtue of a covenant to insure the said premises in the said mortgage deed of February 27th, 1919, and of the provisions of the Conveyancing Act, 1881, sect. 23, is entitled to require the said sum of £1,700, and so much of the said sum of £300 as represents fixtures attached to the freehold, to be applied in reinstating the premises or in payment of her said mortgage debt.

"I find that the said William M'Fadden under and by virtue of the provisions of the said Act is entitled to require that the said moneys be applied, subject to the rights of the said Bessie Kirley as to the same, in payment of his said mortgage debt."

The Official Assignee appealed against so much of the order of O'Shaughnessy J. as confirmed the report and findings of the Chief Registrar in regard to the rights of William M'Fadden.

S. L. Brown K.C. and *M. Byrne,* for the appellant, the Official Assignee:—

We submit that M'Fadden, the second mortgagee, is not entitled to any portion of the money received by the Official Assignee in respect of the policy of insurance. By sect. 19, sub-sect. 1 (ii), of the Conveyancing Act, 1881, a mortgagee is given power to insure and to charge the premiums on the mortgaged property. In this case the mortgagor had himself voluntarily insured the premises. Where an insurance is kept

Supreme Court. 1925.

In re DOHERTY.

up by or on behalf of the mortgagor in accordance with the mortgage deed, the mortgagee is precluded by sect. 23, sub-sect. 2 (ii), of the Conveyancing Act, 1881, from insuring under sect. 19 of that Act. M'Fadden's mortgage did not contain any covenant to insure. Therefore the insurance in this case is not, so far as he is concerned, an insurance effected under the mortgage deed or an insurance effected under the Act.

Sect. 23, sub-sect. 3, of the Conveyancing Act, 1881, enacts that "all money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received"; and sub-sect. 4 of the same section provides that "without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." The question is:—What is the meaning of money received "on an insurance" which the mortgagee may require to be applied, under sub-sect. 4, in or towards discharge of the money due under his mortgage? O'Shaughnessy J. has decided that it means any insurance money. Our submission is that the phrase "on an insurance" in sub-sect. 4 is limited to an insurance of the kind referred to in sub-sect. 3, namely, an insurance effected under a covenant in the mortgagee's (*i.e.*, M'Fadden's) own deed or under the Act; and as M'Fadden's deed contained no such covenant, and as the insurance was not effected under the Act, no portion of the insurance money is payable to him.

Shannon K.C. and *H. Hughes,* for the respondent, William M'Fadden, were not called upon.

KENNEDY C.J.:—

This is an appeal by the Assignee in Bankruptcy from so much of the order made by O'Shaughnessy J., sitting in Bankruptcy, as confirms that portion of the report of the Chief Registrar which finds that the second mortgagee on the bankrupt's premises, William M'Fadden, is, under and by virtue of the Conveyancing Act, 1881, entitled to require that the balance of certain moneys paid under a policy of fire insurance on the mortgaged property should, after payment of money due under the first mortgage, be applied, subject to the rights of Bessie Kirley, the first mortgagee, in payment of the moneys due under his, the second, mortgage. The policy of insurance was effected by the mortgagor, the bankrupt. The first mortgage contained a covenant by the mortgagor to insure the mortgaged property and to keep it insured. There was no covenant for insurance in the second mortgage. The case turns entirely

upon the application, in that state of facts, of sect. 23, sub-sect. 4, of the Conveyancing Act, 1881. That sub-section enacts that:—"Without prejudice to any obligation to the contrary imposed by law, or by special contract"—neither of which applies to the present case—"a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." Mr. Brown, for the Assignee in Bankruptcy, asks us to limit the application of that sub-section by the construction which he puts upon sub-sect. 3 of the same section. His argument is that the proviso—"if the mortgagee so requires"—means "requires the mortgagor," from which he contends that it follows that sub-sect. 3 refers to the case of an insurance effected by a mortgagor pursuant to a covenant to insure contained in the mortgage. He then argues that this limitation which he puts upon the application of sub-sect. 3, must also be applied to the interpretation of sub-sect. 4, and says that, inasmuch as there was no covenant to insure in M'Fadden's mortgage, sub-sect. 4 does not apply to his case, and he is not entitled to the benefit of it. I cannot accept this argument. In my opinion, the plain reading of the whole section is against it. More particularly, sub-clause (iii) of sub-sect. 2 is, in my opinion, clearly in conflict with such a narrowing of sub-sect. 4. In view of the sub-clause I have mentioned, the limitation for which the appellant contends would operate to the prejudice of the mortgagee. In my opinion, the case made for the appellant is not sustainable, and the appeal must be dismissed, with costs. I should add that no question as to reinstatement of the mortgaged premises was raised by this appeal. That question is therefore outside the decision.

O'CONNOR J.:—I concur.

FITZGIBBON J.:—

I concur. I only wish to add that we are not necessarily deciding whether or not, in a mortgage such as that of M'Fadden's, the mortgagee might, or might not, be entitled to have the money spent on reinstatement. As the point has not been argued before us, it would not be right to express an opinion upon it.

Solicitors for the appellants: *John L. Scallan & Co.*
Solicitor for the respondent: *James Rogers.*

C. L.

INDEX.

ACTION to recover possession — Dwellinghouse—Action brought in High Court—Jurisdiction of County Court under Increase of Rent and Mortgage Interest (Restrictions) Act, 1923—Costs [69

See LANDLORD AND TENANT — ACTION TO RECOVER POSSESSION. 1.

—— transfer of, to Circuit Court [24, 32, 33

See PRACTICE—TRANSFER OF ACTION.

AGREEMENT FOR LETTING not signed by tenant — Rent paid thereunder—Estoppel ... 157

See LANDLORD AND TENANT — ACTION TO RECOVER POSSESSION. 2.

AGRICULTURAL MACHINERY, destruction of—Claim for compensation—Principles of assessment 240

See MALICIOUS INJURY. 1.

ANIMALS mansuetae naturae—Terrified cattle escaping into highway — Damage to person on highway—Liability ... 110

See NEGLIGENCE. 2.

APPEAL from Circuit Court to High Court—Principles applicable to the hearing — Malicious injury award 240

See MALICIOUS INJURY. 1.

—— from Circuit Court — Civil cases —Jurisdiction of County Court transferred to Circuit Court [61

See PRACTICE—APPEAL. 2.

—— Right of Minister for Finance to appeal—Malicious injury award [150

See MALICIOUS INJURY. 3.

—— Town Tenants Act, 1906—Award of Circuit Judge — Appeal to High Court — No appeal to Supreme Court 35

See PRACTICE—APPEAL. 1.

APPEAL—*continued.*

—— Workmen's Compensation Act, 1906—Award of Circuit Judge —Appeal to High Court — No appeal to Supreme Court 61

See PRACTICE—APPEAL. 2.

AWARD under Workmen's Compensation Act, 1906—Appeal to High Court — No appeal to Supreme Court 61

See PRACTICE—APPEAL. 2.

—— —— Employer resident in England — Jurisdiction of Irish Free State Courts ... 165

See JURISDICTION.

BANK OF IRELAND — Claim for exemption from Corporation profits tax—Not a "company" as defined by Finance Act, 1918—Liability of members unlimited 90

See REVENUE. 1.

BUILDINGS, total destruction of—Claim for compensation—Principle of assessment ... 240

See MALICIOUS INJURY. 1.

CASES — *Cahir* v. *Minister for Finance* ([1925] 2 I.R. 150) distinguished 195

See MALICIOUS INJURY. 2.

—— *Congested Districts Board* v. *Mayo County Council* (55 Ir. L.T.R. 4) not followed ... 195

See MALICIOUS INJURY. 2.

—— —— distinguished and in part overruled 205

See MALICIOUS INJURY. 4.

—— *Connor* v. *O'Brien* ([1925] 2 I.R. 24) followed 32

See PRACTICE—TRANSFER OF ACTION. 2.

—— *Kennedy* v. *Minister for Finance* ([1925] 2 I.R. 195) followed [205

See MALICIOUS INJURY. 4.

CASES—*continued.*

—— *Kirby* v. *Kerry County Council* ([1921] 2 I.R. 388) not followed 195
See MALICIOUS INJURY. 2.

—— *Macleod* v. *Attorney-General for New South Wales* ([1891] A.C. 455) considered 165
See JURISDICTION.

—— *Noblett* v. *Leitrim County Council* ([1920] 2 I.R. 143) not followed 195
See MALICIOUS INJURY. 2.

—— *R.* (*Armstrong*) v. *County Court Judge of Wicklow* ([1924] 2 I.R. 139) considered ... 165
See JURISDICTION.

—— *Scott* v. *Shepherd* (2 Wm. Bl. 892) followed 110
See NEGLIGENCE. 2.

—— *Turner* v. *Kingsbury Collieries, Ltd.* ([1921] 3 K.B. 169), not followed 165
See JURISDICTION.

—— *Tyler & Sons* v. *Cork County Council* ([1921] 2 I.R. 8) not followed 195
See MALICIOUS INJURY. 2.

—— *Wertheim* v. *Chicoutimi Pulp Co.* ([1911] A.C. 301) followed 1
See SALE OF GOODS.

CASE STATED—Malicious Injury—Omission of any finding that injury was malicious—Omission supplied 195
See MALICIOUS INJURY. 2.

—— —— Malicious Injury—Insufficiency of findings ... 205
See MALICIOUS INJURY. 4.

CATTLE DRIVEN OFF LANDS—Cattle of trespassers put to graze thereon — Malicious injury—Claim for compensation [150
See MALICIOUS INJURY. 3.

CATTLE ON HIGHWAY — Injury to person walking on highway — Mischievous propensity — Scienter 110
See NEGLIGENCE. 2.

CHARGING OR MORTGAGING HOLDING subject to Land Purchase annuity—Restriction imposed—Charge in excess of permitted amount ... 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

CIRCUIT COURT — Appeal from — Principles applicable to the hearing — Malicious Injury award 240
See MALICIOUS INJURY. 1.

—— —— Appeal from — Town Tenants Act, 1906 ... 35
See PRACTICE—APPEAL. 1.

—— —— Workmen's Compensation Act, 1906 61
See PRACTICE—APPEAL. 2.

—— —— Judgment or order in civil cases—Meaning of ... 61
See PRACTICE—APPEAL. 2.

—— —— Prohibition to Judge of—Jurisdiction — Defendants resident in England 165
See JURISDICTION.

"COMPANY," meaning of, in Finance Act, 1918—Claim by, for exemption from corporation profits tax 90
See REVENUE. 1.

COMPENSATION for buildings totally destroyed — Amount to be awarded — Principles of assessment 240
See MALICIOUS INJURY. 1.

—— machinery destroyed—Principles of assessment 240
See MALICIOUS INJURY. 1.

—— meadow grass cut and taken away—Injury to lands ... 195
See MALICIOUS INJURY. 2.

—— loss of grazing—Grass consumed by cattle of trespassers ... 150
See MALICIOUS INJURY. 3.

—— trees cut down and carted away—Theft 205
See MALICIOUS INJURY. 4.

—— Woods cut down — Trees carted away—Series of outrages 87
See MALICIOUS INJURY. 5.

CONSEQUENTIAL DAMAGE, exclusion of—Award of compensation ... 87, 150, 195, 205
See MALICIOUS INJURY. 2, 3, 4, 5.

CONTRACT contained in telegrams—Correspondence 1
See SALE OF GOODS.

CONVICTION, setting aside—Identification of accused—Evidence—Question put by jury—Improper answer — Mixture of hearsay and opinion 73
See CRIMINAL APPEAL. 1.

CONVICTION—*continued.*
—— setting aside — Police officer killed—Apprehending felons—Charge of murder — Manslaughter excluded — Judge's direction 9
See CRIMINAL APPEAL. 2.

CORPORATION PROFITS TAX—Claim for exemption ... 90
See REVENUE. 1.

COSTS, right to—Claim arising out of Increase of Rent and Mortgage Interest (Restrictions) Act, 1923 — Jurisdiction of County Court 69
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 1.

COUNTY COURT — Jurisdiction — Increase of Rent and Mortgage Interest (Restrictions) Act, 1923—Claim arising out of Act —Right to costs 69
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 1.

COUNTY FUND—Claim for income tax — Liability of County Council 139
See REVENUE. 2.

COURT OF APPEAL, jurisdiction of, transferred to Supreme Court [61
See PRACTICE—APPEAL. 2.

1. CRIMINAL APPEAL—IDENTIFICATION OF ACCUSED — *Evidence — Question by jury—Improper answers — Mixture of hearsay and opinion — Setting aside conviction.*] One, Atkinson, was murdered by two men on the 8th March, 1923, and on the following day his widow gave a description of the two men to the Civic Guard. The two appellants were arrested by the military some months later (though not in connection with the murder), and interned in an Internment Camp till February, 1924. In February, 1924, the two appellants were, with other men, paraded before Mrs. Atkinson (the widow of the murdered man) at the Internment Camp, when she pointed out the two appellants. They were handed over to civil custody and charged with the murder on February 21st, 1924. They were put on trial for the murder, were convicted, and sentenced to death. At the trial, after evidence on both sides had closed, the Foreman of the jury said he had been requested by the jury to ask the Judge three questions, of which the third, and the answer, were as follows:—Foreman: "Was it on Mrs. Atkinson's description that accused were identified by the authorities, and, if so, how soon after the arrest?" Superintendent Murphy (of the Civic Guard): "A month after the arrest." The Judge: "Was it from the description of Mrs. Atkinson?" Superintendent Murphy: "Oh, yes, my Lord." Foreman: "That is all we want to know." The Court of Criminal Appeal, being of opinion that the question was put by the jury to test the description of the persons who committed the crime given by Mrs. Atkinson the morning after the murder (though that description was not, in fact, in evidence, and could not have been given in evidence against the prisoners); that the meaning of the question and the substance of the evidence given in answer were that some person or persons referred to indefinitely as "the authorities" shortly after the prisoners had fallen into the hands of the military compared the prisoners with the description given by Mrs. Atkinson, and formed the opinion that the prisoners were the persons described by Mrs. Atkinson; and that the jury in this way satisfied themselves that the identification of the prisoners by Mrs. Atkinson at the identification parade and at the trial agreed with her original description of the men, and that it was more than likely that the jury thought they should be so satisfied before finding a verdict: *Held,* that the conviction should be reversed on the ground that the substance of the evidence obtained by the jury by means of the question was not legal or proper evidence against the appellants, being a mixture of hearsay and opinion of unnamed persons, and that it could not by any device in forming questions have been got legally into evidence on the part of the prosecution against the appellants, and that it was crucial in arriving at the verdict, which depended entirely on identification. *The State* v. *Kelly and Gorman*
[CT. OF CR. APP. 73

2. CRIMINAL APPEAL — POLICE OFFICER KILLED — *Attempting to apprehend felons—Prisoner charged with murder — Manslaughter excluded — Judge's direction—Discharge of jury —Second trial—Duty of Judge.*] Two

CRIMINAL APPEAL—*continued.*

men, F. M. and P. J., armed with revolvers, entered a bank for the purpose of committing a robbery. When they emerged from the bank they were pursued by a Civic Guard in uniform, who called upon them to halt. F. M. fired from his revolver, and shot the Guard dead. Both men were put on trial for wilful murder. The Judge at the trial refused to allow counsel for the accused to address the jury on the question of manslaughter, and directed the jury that the killing of a police officer in apprehending, or attempting to apprehend, felons was murder or nothing. The jury, having deliberated for some time, returned to Court, and the foreman asked the Judge: "Can we reduce the crime to one of manslaughter?" The Judge, having replied in the negative, sent back the jury. They returned again, and the foreman, having announced that they were still unable to agree, the Judge asked if he could assist them in any way, and the foreman said: "Alter the charge as I suggested — if you could alter the charge——." The Judge again said that that could not be done, and the jury were again sent back; and when asked on their third return "Have you agreed?" the answer was "No." They were then discharged, and two days later the accused were again put on trial for the murder. Counsel for the prisoners objected to their being put on trial again for murder, on the ground that at the first trial the jury had intimated that they had agreed to find a verdict of manslaughter if they had the power to do so, and that the direction by the Judge to the contrary was wrong. The objection was overruled, and, at the close of the case for the prosecution, the Judge again ruled that the question of manslaughter was not open. F. M. was found guilty of murder, and was sentenced to death. P. J. was acquitted. The Judge having refused a certificate that the case was a fit case for appeal, F. M. appealed to the Court of Criminal Appeal. It was submitted on behalf of F. M. that the second trial was in the circumstances without jurisdiction and a nullity, and that even if it was proper to try him a second time for murder, the second trial was a mistrial owing to the direction by the Judge that the jury could not find a verdict of manslaughter. *Held*, that what occurred at the first trial did not amount to agreement on the part of the jury to find a verdict of manslaughter, but

CRIMINAL APPEAL—*continued.*

was an effort by them to obtain further guidance and assistance: That it is lawful for the Judge at the trial to discharge a jury before verdict when necessity, in the sense of a high degree of need, for such discharge is made evident to his mind from facts ascertained by him. The existence of such necessity or high degree of need is a matter within the determination and discretion of the trial Judge alone, and his decision is not open to review: That in a proper case, such as that of a police officer killed in the execution of his duty trying to apprehend felons, the Judge must direct a jury that the crime is murder, and that they cannot find manslaughter, i.e. "cannot" according to their oaths: That prisoner's counsel is not entitled to invite the jury to defy the Judge's rulings and directions on law, and to find a verdict on an issue not before them under such directions. *The State* v. *M'Mullen* CT. OF CR. APP. 9

DAMAGES, measure of — Seller wrongfully refusing to deliver goods 1
See SALE OF GOODS.

ESTOPPEL—Order declaring holding to be one to which the Land Act, 1923, applied — Effect of Order 82, 231
See LANDLORD AND TENANT—LAND PURCHASE. 1.

—— Payment of rent — Letting agreement not signed by tenant 157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.

EVIDENCE as to first letting of house—Onus of proof ... 42
See LANDLORD AND TENANT—ACTION FOR RENT.

EVIDENCE—Question put by jury—Improper answer—Mixture of hearsay and opinion — Identification of accused—Setting aside conviction ... 73
See CRIMINAL APPEAL. 1.

"EXTRA TERRITORIUM jus dicenti impune non paretur"—Application of maxim ... 165
See JURISDICTION.

GRASS, meadow, cut and taken away — Compensation for — Injury to lands 195
See MALICIOUS INJURY. 2.

GRASS—*continued.*
—— Consumed by cattle of trespassers — Loss of grazing—Compensation 150
See MALICIOUS INJURY. 3.

GRAZING, loss of—Grass consumed by cattle of trespassers — Compensation 150
See MALICIOUS INJURY. 3.

—— lands, use of — Not similar to using lands as meadow—Grass cut and taken away—Compensation 195
See MALICIOUS INJURY. 2.

HIGHWAY, CATTLE ON—Injury to person walking on highway—Liability 110
See NEGLIGENCE. 2.

IDENTIFICATION OF ACCUSED—Evidence — Question put by jury — Improper answers — Mixture of hearsay and opinion —Setting aside conviction 73
See CRIMINAL APPEAL. 1.

INCOME TAX — Deduction for travelling expenses—Holder of an office or employment of profit 48
See REVENUE. 3.

—— —— Liability of County Council — Interest on moneys raised for rural district councils and board of guardians —Claim to set off interest paid on loans 139
See REVENUE. 2.

INDORSEMENT of conviction on license — Discretion of Justice [144
See LICENSING ACTS.

INSURANCE (FIRE) — Mortgaged property destroyed by fire — Insurance by mortgagor — No covenant to insure — Application of insurance money ... 246
See MORTGAGE.

IRISH FREE STATE COURTS—Jurisdiction of — Defendants resident in England ... 165
See JURISDICTION.

IRISH FREE STATE LEGISLATURE — Jurisdiction — Validity of laws affecting foreigners [165
See JURISDICTION.

JUDGE'S direction to jury—Charge of murder — manslaughter excluded 9
See CRIMINAL APPEAL. 2.

JURISDICTION—IRISH FREE STATE COURTS — WORKMEN'S COMPENSATION ACT, 1906—*Accident causing death of seaman—Dependant resident in Irish Free State — British ship — Owners resident in England—Ship not within the territorial limits of Irish Free State — Claim for compensation — Circuit Court — Prohibition — Legislative powers of the Irish Free State —Validity of laws affecting foreigners —Application of maxim, "Extra territorium jus dicenti impune non paretur" — Workmen's Compensation Act,* 1906 (6 & 7 *Ed.* 7, *c.* 58), *sects.* 2, 7, 8, 11; *Sch. I, Art.* 18; *Sch. II, Arts.* 11, 18—*Irish Free State (Agreement) Act,* 1922 (12 *Geo.* 5, *c.* 4), *sect.* 1; *Sch., Arts.* 1, 17, 18—*Irish Free State Constitution Act,* 1922 (*Session* 2) (13 *Geo.* 5, *c.* 1), *sect.* 1, *Sch.—Irish Free State (Consequential Provisions) Act,* 1922 (*Session* 2) (13 *Geo.* 5, *c.* 2), *sect.* 6—*Constitution of the Irish Free State (Saorstát Eireann) Act,* 1922 (*No.* 1 *of* 1922), *sects.* 1, 2, *Sch. I, Arts.* 2, 12, 64, 65, 66, 73, 75, 83; *Sch. II, Arts.* 1, 17, 18 — *Adaptation of Enactments Act,* 1922 (*No.* 2 *of* 1922), *sects.* 3, 11—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 37, 51 — *Consolidated Workmen's Compensation (Ir.) Rules,* 1917 (*Stat. R. & O.* 1917, *No.* 529), *Rules* 14, 81, 83 — *Provisional Government (Transfer of Functions) Order,* 1922 (*Stat. R. & O.* 1922, *No.* 315)—*Irish Free State (Consequential Adaptation of Enactments) Order,* 1923 (*Stat. R. & O.* 1923, *No.* 405).] A seaman, one of the crew of a British ship registered at the Port of London, was washed overboard and drowned at sea. The ship was owned by an English company, having its registered office in London, and having no place of business or agent in the Irish Free State. The contract of service between the owners of the ship and the seaman was entered into at Cardiff, in Wales. The ship was never, at any material time, within the territorial limits of the Irish Free State. The seaman's mother, who resided in Cork, claimed compensation under the Workmen's Compensation Act, 1906, as a dependant of the deceased, and filed a request for arbitration under that Act, to be heard by the County Court Judge of Cork (East Riding), relying on Rule

JURISDICTION—*continued.*

81 (2) (iii) of the Consolidated Workmen's Compensation (Ir.) Rules, 1917, which provides that in the case of an accident occurring at sea the matter may be heard by the Judge of the County Court in the division in which the dependants of the workman who claim compensation, or some of them, reside. Before the arbitration proceedings could be heard, County Court Judges in the Irish Free State were replaced by Judges of the Circuit Court appointed pursuant to the Courts of Justice Act, 1924 (No. 10 of 1924). The owners of the ship having applied for a writ of prohibition to prohibit the Circuit Court Judge for Cork from proceeding with the arbitration: *Held* by the Supreme Court, reversing the High Court, that liberty to issue the writ should be granted, *Per* Kennedy C.J. (O'Connor J. concurring), because the Judge of the Circuit Court had no jurisdiction to entertain the application for arbitration, as there must be express reciprocal legislation founded on convention or agreement to give effective jurisdiction in such a case, and further, that prohibition was an apt and convenient remedy; *Per* FitzGibbon J., because the rule relied on by the applicant for compensation as giving jurisdiction to the Circuit Court was invalid, and there was no more adequate method of dealing with the case than by granting prohibition. *Turner* v. *Kingsbury Collieries, Ltd.*, [1921] 3 K.B. 169, not followed. *R.* (*Armstrong*) v. *County Court Judge of Wicklow*, [1924] 2 I.R. 139, considered. *R.* (*Alexander*) v. *Circuit Judge for Cork*
[HIGH CT. and SUP. CT. 165, 175

JURISDICTION of High Court to transfer action to Circuit Court [24, 32, 33
See PRACTICE—TRANSFER OF ACTION. 1, 2, 3.

JURY bound by Judge's rulings on law—Counsel cannot invite jury to defy rulings 9
See CRIMINAL APPEAL. 2.

—— discharge of, before verdict given — Necessity for — Power of the Judge—Judge's decision not open to review ... 9
See CRIMINAL APPEAL. 2.

—— finding negligence generally — No duty to find a specific negligent act or omission ... 211
See NEGLIGENCE. 1.

JURY—*continued.*

—— forms of questions to be put to —Action for negligence ... 211
See NEGLIGENCE. 1.

—— Judge's direction to — Prisoner charged with murder — Charge of manslaughter excluded — Police officer killed — Apprehending felons 9
See CRIMINAL APPEAL. 2.

—— question put by — Improper answer — Mixture of hearsay and opinion — Identification of accused — Setting aside conviction 73
See CRIMINAL APPEAL. 1.

LANDLORD AND TENANT — ACTION FOR RENT—*Whether dwelling-house one to which the Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920, *applied—Determination of "Standard Rent"—Evidence—Onus of proof as to letting of dwelling-house — Claim for increased rent—No notice to quit or notice of increase of rent served — Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *sects.* 1, 3, *and* 12, *sub-sects.* 1, 2, *and* 9.] The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), sect. 12 (1), provides: "For the purposes of this Act, except where the context otherwise requires:—(*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let." By sub-sect. (2) the Act applies to a house where either the annual amount of the standard rent or the rateable value does not exceed, in Ireland, £78. A landlord sued his tenant for the rent of a dwelling-house, and the tenant's defence was that portion of the rent claimed was irrecoverable by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenant proved that the dwelling-house was let to him on 1st November, 1918, at a rent of £50 per annum, the landlord giving the tenant possession on that day, the dwelling-house being then vacant. No evidence of any other letting was given by either landlord or tenant, and there

LANDLORD AND TENANT—*con.*
was no evidence as to the rateable value of the house. The rent was subsequently increased, but no notice to quit was served, nor was any notice of increase of rent served by the landlord on the tenant pursuant to the provisions of sect. 3, sub-sect. (2), of the Act. The tenant paid the increased rent for some time. For the tenant it was contended that his evidence as to the letting on 1st November, 1918, was sufficient to show that the dwelling-house was one to which the Act applied, and that, accordingly, the increase of rent was irrecoverable. For the landlord it was contended that as the tenant's defence was that the house was one to which the Act applied, the onus lay on the tenant to prove that defence, and that he had not done so, as the standard rent was the rent at which the dwelling-house was let on the 3rd day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, and the tenant had given no evidence as to any such lettings, and, moreover, that it was only in the case of a house which was first let after the 3rd day of August, 1914, that the rent of a letting made subsequent to that date was the standard rent, and the tenant had not proved that the letting of 1st November, 1918, was the first letting of the house. *Held*, reversing Johnston J., that the evidence of the tenant was sufficient to prove that the dwelling-house was one to which the Act applied, and, accordingly, that the increase of rent was irrecoverable by the landlord. *Bolger* v. *Daly*
[SUPREME COURT 42

1. LANDLORD AND TENANT — ACTION TO RECOVER POSSESSION — *Action brought in High Court — Jurisdiction of County Court under the Increase of Rent and Mortgage Interest (Restrictions) Act*, 1923 — *"Claim or other proceeding arising out of" the Act — Right to costs — Increase of Rent and Mortgage Interest (Restrictions) Act*, 1923 (*No.* 19 *of* 1923), *sect.* 18, *sub-sect.* 1.] The Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, sect. 18, sub-sect. 1, provides:—"A County Court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, and notwithstanding that by reason of the amount of claim or otherwise the case would not

LANDLORD AND TENANT—*con.*
but for this provision be within the jurisdiction of a County Court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the County Court, he shall not be entitled to recover any costs unless the Court on any special ground shall otherwise order." Plaintiff brought an action in the High Court to recover possession of a flat held from him by the defendant as a statutory tenant under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, the rent having fallen into arrear. Judgment for possession was given, but defendant contended that under sect. 18, sub-sect. 1, plaintiff was not entitled to recover any costs. *Held*, that the action was not a "claim or other proceeding arising out of" the Act, or any of the provisions thereof, within the meaning of the section, and accordingly the plaintiff was entitled to costs. *Hodgens* v. *Furey*
[JOHNSTON J. 69

2. LANDLORD AND TENANT — ACTION TO RECOVER POSSESSION — *Whether possession protected by Increase of Rent and Mortgage Interest (Restrictions) Act*, 1923 — *Letting "for a temporary convenience or to meet a temporary necessity" — Whether the purpose of the letting must be stated — Letting Agreement not signed by tenant — Rent paid — Position of tenant — Estoppel — Six months' tenancy renewed from time to time—Notice to quit—Land Law (Ir.) Act*, 1881 (44 & 45 *Vict. c.* 49), *sect.* 58, *sub-sect.* 7—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1923 (*No.* 19 *of* 1923), *sect.* 4, *sub-sect.* 8.] The Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, sect. 4, sub-sect. 1, provides:—"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" certain conditions are fulfilled; and by sub-sect. 8:—"This section shall not apply to any dwelling-house let to a tenant . . . for the temporary convenience, or to meet a temporary necessity, either of the landlord or tenant." Defendant signed an agreement to take plaintiff's house (to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, applied) for a period of six months, to cover the period during which the

LANDLORD AND TENANT—*con.*
plaintiff expected to be in America, this purpose of the letting being explained to the defendant although not expressed in the document. On the expiration of the six months, another agreement for six months was signed by the defendant, and on its expiration a further agreement for six months was also signed by him on similar terms. Thereafter, for four periods of six months each, similar agreements were sent to the defendant for signature, but he did not sign them or return them, but paid the rent due thereunder. On the expiration of the last of these periods plaintiff brought an action to recover possession of the premises. No notice to quit had been served. *Held* by the Supreme Court (affirming Sullivan P.) that there was no continuing tenancy which required to be terminated by a notice to quit, and, further, that the letting was made for the temporary convenience, or to meet a temporary necessity of the plaintiff within the meaning of sect. 4, sub-sect. 8, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, and therefore the plaintiff was entitled to possession. *Quaere*: whether, in the case of a letting for temporary convenience or to meet a temporary necessity under sect. 4, sub-sect. 8, of the Act, the purpose of the letting must be within the knowledge of both parties at the time of making the contract. *Rinn* v. *M'Carthy*
[SUPREME COURT 157

1. LANDLORD AND TENANT — LAND PURCHASE — *Action for recovery of possession — Expiration of lease—Order declaring the holding to be one to which the Land Act, 1923, applies—Alteration in the relationship of landlord and tenant—Crucial date —Position of tenant — Rights conferred — Estoppel — Land Act, 1923 (No. 42 of 1923), sects. 19, 20, sect. 24, sub-sect. 1, sect. 70, sect. 73, sub-sect. 2.*] Sect. 24, sub-sect. 1, of the Land Act, 1923 (No. 42 of 1923), passed on August 9th, 1923, provides:—"Subject to the provisions of this Act and notwithstanding anything contained in any other enactment, all tenanted land wherever situated . . . shall by virtue of this Act vest in the Land Commission on the appointed day, in the like manner and with the like consequences as if vesting orders under the Land Purchase Acts had been made on the appointed day in respect thereof in pursuance of subsequent purchase agreements entered into by the Land Commission with the respective owners of the lowest interest in the land constituting an interest saleable under the Land Purchase Acts, at the price fixed by or under this Act." M., being tenant for life of certain lands, demised them for the term of her life to the defendant. Upon M.'s death on August 22nd, 1924, the plaintiff, being entitled in remainder in fee-simple, brought an action to recover possession of the lands. During M.'s lifetime the defendant had obtained an order from Wylie J. declaring that the lands constituted a holding to which the Land Act, 1923, applied. "The appointed day" mentioned in sect. 24, sub-sect. 1, of the Act had not been fixed. *Held* by the Supreme Court (Kennedy C.J. and FitzGibbon J.; Johnston J. dissenting), that lands which, at the date of the passing of the Act, are comprised in a holding within the operation of the purchase and sale provisions of the Act, do not cease to be within those provisions by the happening of an event, such as would, but for the Act, determine the tenancy before the actual vesting of the lands in the Land Commission or the appointment of a day for such vesting under the provisions of the Act. The first step in the scheme for the compulsory sale and purchase of holdings to which the Act applies is the abolition of rent-paying to the landlord upon the passing of the Act; and the date of that first step is the crucial date for determining the application of the Act to tenanted land. The Act contains no provision for the cancellation of its application in circumstances such as those in the case before the Court, and therefore the change of position brought about by M.'s death was not such as to take the holding out of the operation of the Act, and accordingly the plaintiff was not entitled to an order for possession. *Held*, further, that it followed from the order of Wylie J. that the holding would automatically vest in the Land Commission as tenanted land. *Lynham* v. *Butler* ... SULLIVAN P. 82
[SUPREME COURT 231

2. LANDLORD AND TENANT — LAND PURCHASE—HOLDINGS SUBJECT TO LAND PURCHASE ANNUITY — RESTRICTION ON MORTGAGING OR CHARGING — *Charge in excess of per-*

LANDLORD AND TENANT—*con.*

mitted amount—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 54, *sub-sect.* 3—*Repeal of restriction by the Land Act*, 1923 (*No.* 42 *of* 1923), *sect.* 78—*Effect of repeal—Repeal not retrospective—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *sect.* 38, *sub-sect.* 2 (*a*), (*b*), (*c*) — *Vendor's lien — Other security taken — Abandonment of lien.*] Sect. 54, sub-sect. 3, of the Irish Land Act, 1903 (3 Ed. 7, c. 37), provides that the proprietor of a holding, for the purchase of which the Land Commission have made an advance under the Land Purchase Acts, shall not, without the consent of the Land Commission, mortgage or charge the holding for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity, and that every instrument of mortgage or charge by which the holding is charged with any larger sum shall be null and void as to the excess. By sect. 78 of the Land Act, 1923 (No. 42 of 1923), passed on August 9th, 1923, sect. 54, sub-sect. 3, of the Irish Land Act, 1903, is repealed. In 1921 the purchaser of three farms, of which one was held under a fee-farm grant, and the other two had been purchased under the Land Purchase Acts, and were held subject to Land Purchase annuities aggregating £14 5s. 4d., paid therefor £560 in cash, and the balance of the purchase-money, amounting to £950, was secured, as to £550 thereof by a mortgage on the farm held under the fee-farm grant, and as to the remaining £400 by a charge on the two farms held subject to the Land Purchase annuities. On October 31st, 1923, the purchaser was adjudged bankrupt. On January 2nd, 1924, the vendors, acting under their powers of sale as mortgagees, sold the three farms for £950, and appropriated £400 in satisfaction of their charge on the two farms subject to the Land Purchase annuities. It was submitted by the Official Assignee in Bankruptcy that, as regards the charge for £400, the vendors were entitled to retain only £142 13s. 4d., a sum representing ten times the amount of the annuities. On behalf of the vendors it was contended that the repeal effected by the Land Act, 1923, removed the restriction on the amount of their charge, and that they were entitled to retain the full amount. Alternatively, they relied upon a vendor's lien. *Held* (affirming Murnaghan J.), that the instrument of charge being, by virtue

LANDLORD AND TENANT—*con.*

of sect. 54, sub-sect. 3, of the Irish Land Act, 1903, null and void from the moment of its creation as to the excess over the permitted amount, the repeal of that sub-section by sect. 78 of the Land Act, 1923, did not make valid the charge for such excess. *Held* also that the effect of sect. 54, sub-sect. 3, of the Irish Land Act, 1903, upon the vendor's charge was preserved by sect. 38, sub-sect. 2, of the Interpretation Act, 1889. *Held*, further, that the transaction did not give rise to a vendor's lien for unpaid purchase-money. And that even if this view were incorrect, the vendors, by taking the mortgage securities, evidenced their intention of abandoning their lien. Accordingly the vendors were only entitled to a valid charge for £142 13s. 4d. on the farms subject to the Land Purchase annuities, and they were ordered to lodge with the Official Assignee in Bankruptcy the balance of their charge for £400. *In re Stewart* SUPREME COURT 51

LANDS, INJURY TO—Meadow grass cut and taken away — Claim for compensation ... 195
See MALICIOUS INJURY. 2.

—— —— — Grass consumed by cattle of trespassers—Loss of grazing—Compensation ... 150
See MALICIOUS INJURY. 3.

LARCENY, CASES INVOLVING — Malicious injury claims 87, [150, 195, 205
See MALICIOUS INJURY. 2, 3, 4, 5.

—— Meadow grass cut and taken away—Compensation ... 195
See MALICIOUS INJURY. 2.

—— Grass consumed by cattle of trespassers—Compensation 150
See MALICIOUS INJURY. 3.

—— Trees cut down and carried away—Claim for compensation [205
See MALICIOUS INJURY. 4.

—— Woods cut down and trees carried away—Claim for compensation 87
See MALICIOUS INJURY. 5.

LAWS OF IRISH FREE STATE affecting foreigners — Validity of 165
See JURISDICTION.

LEASE, EXPIRATION OF — Position of tenant—Tenanted land to which Land Act, 1923, applied 231
See LANDLORD AND TENANT—LAND PURCHASE. 1.

LEASE — Letting agreement not signed by tenant—Rent paid—Estoppel 157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.

"LETTING for a temporary convenience or to meet a temporary necessity"—Exclusion of, from Rent Restriction Act—Whether purpose of letting must be stated 157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.

LICENSING ACTS—OFFENCES—*Indorsement of conviction on license—Discretion of the Justice—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *sect.* 78—*Licensing Act* (*Ir.*), 1874 (37 & 38 *Vict. c.* 69), *sects.* 21, 38—*Intoxicating Liquor* (*General*) *Act*, 1924 (*No.* 62 *of* 1924), *sect.* 16, *Sch. I.*] Sect. 16 of the Intoxicating Liquor (General) Act, 1924 (No. 62 of 1924), provides that where a license holder "is convicted of an offence against any of the enactments mentioned in the First Schedule to this Act . . . the conviction shall be recorded on the license of the person so convicted." Among the sections cited in the First Schedule is "Licensing Act, 1872 . . . sect. 78 (which imposes a penalty for selling drink during prohibited hours)." Sect. 78 of the Act of 1872 in fact deals with several offences, including "selling" and "exposing for sale" intoxicating liquors during prohibited hours. A Justice, having convicted the respondent on the charge of "exposing for sale" only, and having fined him £2, held that the First Schedule to the Act of 1924 did not apply to this offence, and in the exercise of his discretion refused to endorse the license. *Held* by the High Court, on case stated, that the decision of the Justice was erroneous; that the reference in the First Schedule of the Act of 1924 to sect. 78 of the Act of 1872 applied to all the offences mentioned in the latter section; that the Justice had no discretion in the matter; and that consequently the license must be endorsed. The conviction of an offence against any of the sections

LICENSING ACTS—*continued.*
enumerated in the First Schedule to the Act of 1924 must be recorded on the licence. *The Attorney-General* (*Millard*) v. *Madigan*
[HIGH COURT 144

LIEN, VENDOR'S—Transaction not giving rise to—Other security taken—Abandonment of lien
[51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

MANSLAUGHTER, CHARGE OF, EXCLUDED — Police officer killed—Attempt to apprehend felons—Judge's direction 9
See CRIMINAL APPEAL. 2.

"MARKET VALUE" of buildings totally destroyed — Assessment of Compensation 240
See MALICIOUS INJURY. 1.

MACHINERY, DESTRUCTION OF —Compensation for ... 240
See MALICIOUS INJURY. 1.

MALICE, MEANING OF, in Criminal Injury Code, 195, [205
See MALICIOUS INJURY. 2, 4.

1. MALICIOUS INJURY—BUILDINGS TOTALLY DESTROYED—*Compensation—Principle of assessment—Market value—Special adaptability of lands—Absence of "reinstatement condition"—Destruction of machinery — Assessment of compensation — Practice — Appeal from Circuit Court to High Court — Principles applicable to the hearing—Damage to Property* (*Compensation*) *Act*, 1923 (*No.* 15 *of* 1923), *sect.* 6, *sect.* 10, *sub-sects.* 1, 5, 13, 14—*Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 61, 62.] The High Court, on hearing an appeal under sect. 61 of the Courts of Justice Act, 1924, from an award of compensation made by a Judge of the Circuit Court under the Damage to Property (Compensation) Act, 1923, should act on the principles applicable to an appeal from the decision of a Judge in an action tried without a jury. The "market value" of a destroyed building (as defined by sect. 10, sub-sect. 13, of the Damage to Property (Compensation) Act, 1923) was assessed by the High Court (in default of evidence of an actual price paid recently for the premises) by estimating the net rent that a

MALICIOUS INJURY—*continued.*
tenant would pay, and capitalising this amount at a number of years' purchase, having regard to the particular class of property, the district in which it was situated, and all the relevant considerations. Compensation for a destroyed dwelling-house and out-offices, in respect of which no "reinstatement condition" had been attached by the Judge of the Circuit Court, was on appeal fixed by the High Court at the "market value" of the premises, being the maximum amount allowable by sect. 10, sub-sect. 5, of the Act. Method of assessment of compensation for agricultural machinery maliciously destroyed considered. *Lewin* v. *Minister for Finance* ... HIGH COURT 240

2. MALICIOUS INJURY—MEADOW GRASS CUT AND TAKEN AWAY—*Injury to lands — Claim for compensation — Malice — Consequential damage — Larceny—Grand Jury (Ireland) Act,* 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135 *—Local Government (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-sect.* 1 — *Malicious Damage Act,* 1861 (24 & 25 *Vict. c.* 97), *sect.* 51— *Damage to Property (Compensation) Act,* 1923 (*No.* 15 *of* 1923), *sect.* 6.] The Supreme Court *held* that sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), forbids the awarding of compensation for "consequential loss," both of the type appearing in *Noblett* v. *Leitrim County Council,* [1920] 2 I.R. 143, and of the type appearing in the group of cases: *Tyler & Sons* v. *Cork County Council,* [1921] 2 I.R. 8; *Kirby* v. *Kerry County Council,* [1921] 2 I.R. 388; and *Congested Districts Board* v. *Mayo County Council,* 55 I.L.T.R. 4; so that the decisions in these cases as regards the measure of compensation under the Criminal Injuries Acts no longer represent the law. The effect of the section is to restore what was the true legal position, as regards the subject-matter in respect of which compensation is to be awarded, as it stood upon the enactment of sect. 5 of the Local Government (Ir.) Act, 1898. It is not the value of the spoil or plunder which is to be awarded, but compensation for the actual damage maliciously done to the property injured in the case of an unlawful and malicious spoliation within the meaning of sect. 51 of the Malicious Damage Act, 1861. A case stated for the Supreme Court under the Criminal

MALICIOUS INJURY—*continued.*
Injuries Acts stated that the grass of the applicant's meadow was cut and taken away, and the fences on his lands were maliciously damaged on a date within the period covered by Part II of the Damage to Property (Compensation) Act, 1923. There was no finding that the cutting or taking away of the grass was malicious, but it was admitted that both were unlawful: *Held* by the Supreme Court that this admission, taken with the surrounding circumstances of fences found to have been maliciously injured on the same occasion, supplied, as regards the cutting of the grass, the omission from the case stated of an express finding that it was in fact malicious within the meaning of the Criminal Injuries Acts. *Held* further, that the cutting and taking away of the grass of a meadow is different from the using of grazing lands as such, and may, according to the facts proved in a particular case, be a "spoiling" of property within sect. 51 of the Malicious Damage Act, 1861, entitling the owner to compensation under sect. 5 of the Local Government (Ir.) Act, 1898. But in order to recover such compensation the owner of the meadow must discharge the onus resting on him of proving destruction of or injury to his property, and he can only recover for the actual damage done to the property injured. As the applicant had not proved any injury to his property by the cutting of the grass, and as the taking away of the grass was not a subject for compensation, he was not entitled to any compensation for that part of his claim which related to the cutting and taking away of the grass. *Cahir* v. *Minister for Finance,* [1925] 2 I.R. 150, distinguished. *Kennedy* v. *Minister for Finance* ▸

[SUPREME COURT 195

3. MALICIOUS INJURY—RIGHT OF APPEAL — *"Party" — Minister for Finance — Claim for compensation — Forcible seizure of farm — Loss of grazing—Grass consumed by cattle of trespassers — Exclusion of compensation for consequential loss — Loss of the use of the property injured — Local Government (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 5—*Damage to Property (Compensation) Act,* 1923 (*No.* 15 *of* 1923), *sects.* 5 *and* 6 — *Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sect.* 61.] By sect. 5 of the Damage to Property (Compensation)

MALICIOUS INJURY—*continued.*

Act, 1923 (No. 15 of 1923), the Minister for Finance is entitled to appear and be heard by solicitor, with or without counsel, and generally to take part in the hearing of every application under the Criminal Injuries Acts for compensation in respect of an injury to which Part II of the Act applies and every proceeding by way of appeal or case stated arising out of or following on any such application: *Held,* having regard to the provisions of this section, that the Minister for Finance is a party entitled to appeal, under sect. 61 of the Courts of Justice Act, 1924 (No. 10 of 1924), to the High Court from an order of the Circuit Court made on an application for compensation in respect of an injury to which Part II of the Damage to Property (Compensation) Act, 1923, applies. Sect. 6 of the Damage to Property (Compensation) Act, 1923, provides that the right to compensation shall, as respects any injury to which Part II of the Act applies, be limited to compensation for the actual damage done to the property injured, "and shall not extend to any compensation for any loss consequential on such actual damage, and in particular shall not extend to compensation for the loss of the use of the property injured, or for the loss of mere pleasure or amenity." The applicant's cattle were driven off his lands, and the cattle of strangers were put to graze on the lands for two seasons. The applicant claimed compensation under Part II of the Act for the forcible seizure and grazing of the lands: *Held,* that the consumption of the grass was the only form of use to which the lands could be put, and it involved nothing more than the "loss of the use" of the lands, and therefore the applicant was not entitled to compensation. *Cahir* v. *Minister for Finance* ... SUPREME COURT 150

4. MALICIOUS INJURY — TREES CUT DOWN AND CARTED AWAY — *Claim for compensation—No proof of ownership—Theft—Malice—Insufficiency of findings—Malicious Injuries (Ir.) Act,* 1853 (16 & 17 *Vict. c.* 38), *sect.* 1—*Local Government (Ir.) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 5—*Damage to Property (Compensation) Act,* 1923 (*No.* 15 *of* 1923), *sect.* 6.] The applicants, timber merchants, claimed compensation under the Criminal Injuries Acts in respect of 175 growing trees,

MALICIOUS INJURY—*continued.*

which had been purchased by them, together with other timber, from F. on the latter's demesne lands. It was proved that the trees in question were, on different dates between November, 1921, and July, 1922, felled, cut, and carted away by a large number of persons resident in the neighbourhood. The trees had been felled in a manner which rendered them unsuitable for the purposes of the applicants. There was no evidence as to whether the persons who felled and carted away the trees constituted an unlawful assembly; and no evidence was given as to the nature of the purchase transaction between the applicants and F. On the authority of *Congested Districts Board* v. *Mayo County Council,* 55 Ir.L.T.R. 4, the Commissioner acting under the County Court Appeals Act, 1924 (No. 57 of 1924), awarded compensation to the applicants, and this included compensation for the timber taken away. On appeal to the Supreme Court by way of case stated: *Held,* applying *Kennedy* v. *Minister for Finance,* [1925] 2 I.R. 195, that the decision in the *Congested Districts Board* v. *Mayo County Council,* 55 Ir.L.T.R. 4, was erroneous in ruling that compensation should be given in respect of the value of the trees taken away; and that sect. 6 of the Damage to Property (Compensation) Act, 1923 (No. 15 of 1923), expressly forbids the awarding of such compensation. *Held* also, that the applicants had not shown that the corporeal tangible property alleged to have been injured was, at the time of the damage, actually vested in them so as to entitle them to make a claim under the Criminal Injuries Acts, and that the findings of the Commissioner did not justify any award of compensation. *Connolly* v. *Minister for Finance*

[SUPREME COURT 205

5. MALICIOUS INJURY — WOODS CUT DOWN AND TREES CARRIED AWAY—*Series of outrages—Motive not theft but destruction — Right to compensation.*] Parties of men, acting in concert, entered the claimant's woods, which surrounded his residence, and cut down about 5,580 trees, during a period of three or four months in the year 1922, and the trees were taken away by these men and by others. *Held,* that the damage was malicious and the claimant was entitled to compensation, the Court being of opinion that the outrage was not primarily

MALICIOUS INJURY—*continued.*
actuated by the motive of theft, but was one of many attempts to overthrow all law and all security for property in the country. *Lansdowne* v. *Kerry County Council*
[HIGH COURT 87

MASTER AND SERVANT—Servant obtaining assistance—Scope of authority 110
See NEGLIGENCE. 2.

MINISTER FOR FINANCE—Right of appeal—Malicious injury—Claim for compensation ... 150
See MALICIOUS INJURY. 3.

MISCHIEVOUS PROPENSITY — Meaning of term — Cattle terrified by railway journey—Escaping into highway—Injury to person on highway—Liability for damage 110
See NEGLIGENCE. 2.

MORTGAGE — MORTGAGED PROPERTY DESTROYED BY FIRE — *Insurance by mortgagor—No covenant to insure—Application of insurance moneys — Rights of mortgagee — Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *sect.* 23, *sub-sects.* 3 *and* 4.] Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 19, sub-sect. 1 (ii), a mortgagee, where the mortgage is made by deed, is empowered to insure the mortgaged property against loss or damage by fire. Sect. 23, sub-sect. 2, provides: "An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):—. . . (ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed; (iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorised to insure." Sub-sect. 3: "All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received." Sub-sect. 4: "Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." The premises of a bankrupt, subject to two mortgages, and insured by himself, were destroyed by fire, and the money due in respect of the insurance was received by the Official Assignee. In the first mortgage deed there was a covenant to insure the mortgaged property and keep it insured; but the second mortgage deed contained no such covenant. A finding by the Chief Registrar that the first mortgagee was entitled to require that the insurance money be applied in reinstating the premises or in payment of her mortgage debt, and that the second mortgagee was entitled to require the money to be applied, subject to the rights of the first mortgagee, in payment of his mortgage debt, was affirmed by O'Shaughnessy J.; and from so much of that decision as affected the rights of the second mortgagee, the Official Assignee appealed. *Held* (affirming O'Shaughnessy J.), that the money received "on an insurance" which a mortgagee may require, under sub-sect. 4 of sect. 23, to be applied in or towards discharge of the money due under his mortgage is not limited as in sub-sect. 3 to money received on an insurance effected under the mortgage deed or under the Act. *Re Doherty* ... SUPREME COURT 246

MORTGAGING OR CHARGING — Holding subject to Land Purchase annuity—Restriction imposed—Charge in excess of permitted amount 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

MURDER, prisoner charged with—Charge of manslaughter excluded—Police officer killed—Attempting to apprehend felons—Judge's direction 9
See CRIMINAL APPEAL. 2.

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—*Collision between motor-car and motor-cycle—Personal injuries —Form of questions to be put to jury—Jury finding negligence generally — No duty to find a specific negligent act or omission.*] Plaintiff was driving a motor-bicycle with a side-car attached down hill on a winding road with blind turnings. The defendant was driving a motor-car up the same hill. The two

NEGLIGENCE—*continued.*

machines collided at a blind turning, and, as a result of the collision, the plaintiff was seriously injured. Plaintiff was going at 7 miles an hour; the defendant, on his own evidence, was going at least 15 miles an hour, but witnesses estimated his speed at from 20 to 28 miles an hour. There was conflicting evidence as to whether either the plaintiff or the defendant was on his proper side of the road. Neither sounded his horn when immediately approaching the turn where the accident happened. Three questions were left to the jury:—(1) Was the defendant negligent? (2) Was the plaintiff negligent? (3) Could the defendant by the exercise of reasonable care have avoided the collision? The Judge declined to put the first question in the following form:—"Was the defendant guilty of negligence (*a*) by driving at an excessive speed; (*b*) by driving on the wrong side of the road; (*c*) by not keeping a proper look-out?" All three questions were answered by the jury in the affirmative, and on these findings the Judge entered judgment for the plaintiff. It was admitted that the Judge gave proper directions to the jury. *Held* by the Supreme Court that the jury was entitled to find negligence generally, without any finding of a specific negligent act or omission, and that the questions put to the jury met the requirements of the case, and there was evidence to support the findings. Form of questions to be put to the jury considered. *Per* Kennedy C.J.: There was evidence upon which it was open to a jury to find that the defendant had the final opportunity to avoid the collision, which it was his duty to avoid if he could, however negligent the plaintiff may have been, and that he failed in that opportunity, and that his failure was the immediate and effective cause of the accident. Decisions relating to contributory negligence considered by FitzGibbon J. *Logan* v. *O'Donnell* SUP. CT. 211

2. NEGLIGENCE—ESCAPED BULLOCK—*Terrified when being unloaded from a train—Running unattended through the streets of city—Injury to person walking along street — Mischievous propensity — Scienter — Novus actus intervenions—Servant obtaining assistance—Scope of authority.*] Defendants purchased cattle in the country, and sent them by train to Dublin. A

NEGLIGENCE—*continued.*

special place for the unloading of cattle was provided at the railway terminus, surrounded with strong wooden fences to prevent the cattle escaping when being unloaded. The cattle were not unloaded at this place, but at the end of the passenger platform, where there are no cattle pens. This place is surrounded by a wall, and has a gate opening on to the public road. Defendants' foreman cattle drover and another of their drovers unloaded the cattle, but neither of them closed the gate leading to the public road. Defendants' foreman admitted that cattle were liable to take fright when they were being unloaded, and that precautions were necessary. During the unloading two bullocks "got wild" on the platform, rushed upon the adjoining ground, were driven back, escaped through the gate, and ran through the streets of the city. While driving the rest of the cattle to defendants' premises, the foreman drover met H., another drover, whom he knew, and asked him to go in search of the two missing bullocks. Having found them in a yard off a lane, H. left them there and returned and informed the defendants' foreman, who sent H. and one of the defendants' drovers to bring back the two bullocks. Meantime the bullocks, having entered the yard, did damage; and the owner of the yard drove them out to save his goods from destruction. Continuing to run through the streets, one of these bullocks knocked down and injured the plaintiff, who sued the defendants for damages for the personal injuries caused by the negligence of the defendants' servants. At the trial of the action the jury found that at the time of the occurrence the bullock that injured the plaintiff was in the public street unattended by any servant of the defendants; that the defendants' men did not take proper precautions at the unloading of the cattle to prevent them escaping on to the public street, inasmuch as the cattle should have been unloaded at the proper unloading place; that the defendants' servants were not guilty of negligence in not following the two bullocks and getting them under proper control, but that if H. were to be regarded as one of the defendants' men he was guilty of negligence in leaving the bullock at the yard where he saw it. They assessed damages at £250. Upon these findings Johnston J. gave judg-

NEGLIGENCE—*continued.*
ment for the defendants, on the ground that there was no evidence of negligence on the part of the defendants connected with the damage suffered by the plaintiff. *Held* by the Supreme Court (Kennedy C.J., O'Connor and FitzGibbon JJ.), reversing Johnston J., that the judgment entered for the defendants must be set aside, and (FitzGibbon J. dissenting) that judgment should be entered for the plaintiff. *Held* by FitzGibbon J., that there should be a new trial of the action. *Per* Kennedy C.J.: The expression, a "mischievous propensity" in animals, *mansuetae naturae*, is not limited to something of a chronic character, but may be a passing and temporary phase of the character or temper of the particular animal, as well as a chronic or permanent element of its nature; that the bullock that injured the plaintiff on emerging from the railway waggon displayed its wild condition to the defendants' servants in such a way as to deprive them of the benefit of the doctrine of the *prima facie* harmlessness of domestic animals as frequenters of the highway; and that the duty of controlling it as though it belonged to the class of animals *ferae naturae* had fallen on the defendants and their servants. *Held* also by the Supreme Court, that the action of the owner of the yard in driving the bullocks out to save his goods was not a *novus actus interveniens* which broke the chain of causation and deprived the plaintiff of her remedy against the defendants. *Scott* v. *Shepherd*, 2 Wm. Bl. 892, followed. Decisions relating to the liability of the owners of animals *mansuetae naturae* doing damage on the highway considered. *Howard* v. *Bergin, O'Connor, & Co.*
[JOHNSTON J. and SUP. CT. 110, 118

NOTICE TO QUIT not required — Letting for temporary convenience—Six months' tenancy —Tenancy renewed from time to time 157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.

NOVUS ACTUS INTERVIENS — Cattle on highway running into shop — Owner of shop driving cattle out—Injury to person on highway—Liability for damage [110
See NEGLIGENCE. 2.

"PARTY" entitled to appeal—Malicious injury — Claim for compensation 150
See MALICIOUS INJURY. 3.

PICKETING of premises—Trade dispute — Workmen arrested by Government forces ... 37
See TRADE UNION.

POLICE officer killed—Attempting to apprehend felons — Prisoner charged with murder — Manslaughter excluded — Judge's direction 9
See CRIMINAL APPEAL. 2.

POSSESSION of dwelling-house — Action to recover—Jurisdiction of County Court under Increase of Rent and Mortgage Interest (Restrictions) Act, 1923—Right to costs 69
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 1.

1. PRACTICE — APPEAL — *Town Tenants (Ireland) Act*, 1906 (6 *Ed.* 7, *c.* 54), *sect.* 11—*Appeal from award of Circuit Judge — Jurisdiction to hear appeal — Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 18, 22, 61.] A claim under the Town Tenants (Ireland) Act, 1906, was instituted on the 4th July, 1924, at which date there was no Circuit Court for the district in which the premises in question were situated. The claim was heard and an award made by the Circuit Judge subsequently appointed, on 1st October, 1924, whereupon the respondent appealed to the Supreme Court. *Held*, that under sect. 61 of the Courts of Justice Act, 1924, the appeal should have been brought to two Judges of the High Court, and that no appeal lay to the Supreme Court. *Salmon* v. *Molony* ... SUPREME COURT 35

2. PRACTICE — APPEAL — WORKMEN'S COMPENSATION ACT, 1906 (6 ED. 7, C. 58), SCHEDULE II, ART. 4—*Appeal from award of compensation by Judge of Circuit Court—Jurisdiction of Supreme Court to hear appeal — Jurisdiction vested in Court of Appeal transferred to Supreme Court — Appeal to High Court — Whether award is a "judgment or order of the Circuit Court in a civil case" — Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 18, 51, 61, *and* 63.] No appeal lies to the Supreme Court of the Irish Free State from an award

PRACTICE—*continued.*

made by a Judge of the Circuit Court under the Workmen's Compensation Act, 1906. The appeal lies to two Judges of the High Court under sect. 61 of the Courts of Justice Act, 1924, as such an award is a "judgment or order of the Circuit Court in a civil case" within the meaning of that section. *Per* Kennedy C.J.: The expression "civil cases" in sect. 61 of the Courts of Justice Act, 1924, is used in the wide and comprehensive sense of ordinary language, in contradistinction to criminal cases, whereof one class only, namely, cases tried on indictment, is, by sect. 63, made the subject of appeal from the Circuit Court to the Court of Criminal Appeal. *Quaere* whether there is not an appeal to two Judges of the High Court from a judgment or order of the Circuit Court in all civil cases, including matters in which the decisions of the former County Court, whose jurisdiction in respect thereof has been transferred to the Circuit Court, were final and conclusive, and subject to no appeal. *Lynch* v. *Limerick County Council*

[SUPREME COURT 61

1. PRACTICE—TRANSFER OF ACTION — *Action commenced in the High Court — Transfer to Circuit Court — Jurisdiction — Action of tort — Personal injuries—Unliquidated damages — No specific amount claimed — Test whether action should be transferred —Courts of Justice Act*, 1924 (*No.* 10 *of* 1924), *sects.* 25, 48, 51, 56.] An infant plaintiff, suing by his father and next friend, instituted an action in the High Court, claiming damages from the defendant for personal injuries and for damage to his motor bicycle occasioned through the negligent driving of defendant's motor car. Plaintiff was a carpenter by trade, earning £2 18s. a week, with other occasional employment in his spare time; and the injuries complained of were a compound fracture of his right leg, alleged to result in shortening of the limb, and other possible consequences of a non-permanent character. Plaintiff merely claimed damages in his writ, without specifying any amount. Defendant applied to have the action transferred to the Circuit Court. The jurisdiction of the Circuit Court prescribed by sect. 48 of the Courts of Justice Act, 1924, in cases of tort (unless on consent) is "jurisdiction when the claim does not exceed £300." In an affidavit in support of

PRACTICE—*continued.*

the motion to transfer, defendant stated that plaintiff's father and next friend had no visible means to pay his (defendant's) costs if a verdict was found against the plaintiff, that he had a good defence to the action, and denied liability. In another affidavit in support of the motion a doctor stated that the plaintiff's injuries would not in all probability leave any permanent disfigurement, and that the plaintiff ought to be able to resume work within a month. In an affidavit resisting the motion, plaintiff made a case, on money lost for twenty-three weeks since the accident, of over £120. *Held* (reversing Murnaghan J.), that the action ought not to be transferred to the Circuit Court. *Per* Kennedy C.J.: The High Court has jurisdiction to transfer to the Circuit Court an action claiming unliquidated damages in tort if, on the facts, it appears that the action might have been commenced in the Circuit Court. And in determining whether a particular action might, on its facts, have been commenced in the Circuit Court, the plaintiff's statement of his case (unless unequivocally displaced) must be accepted for this purpose, and the question must resolve itself into this: Has the plaintiff stated (upon the affidavits opposing an application to transfer the action) a case upon which a jury could reasonably give him a verdict for a sum exceeding £300? If a jury found for him upon that statement of his case and nothing more, and awarded him any larger sum than £300, would the verdict be set aside on the ground that the damages were excessive? That is the primary test by which the question of transfer to the Circuit Court of actions for unliquidated damages in tort must be determined. *Per* FitzGibbon J.: In deciding whether an action might have been commenced in the Circuit Court, or whether it ought not to have been commenced in the High Court, whether a sum exceeding £300 has been formally claimed, or the originating process has been endorsed with a claim for damages generally, without specifying an amount, if the amount of damages recoverable is the only question involved in the decision, the Court must consider whether the plaintiff could reasonably contemplate the recovery of a sum for damages beyond the jurisdiction of the Circuit Court. If a verdict for a sum exceeding £300, given by a reasonable jury, properly

PRACTICE—*continued.*
directed and acting upon the evidence as presented to the Court, would not be set aside as excessive, the action ought not to be transferred. *Per* Kennedy C.J.: The question of the transfer of an action from the High Court to the Circuit Court must be approached in a different way, and be determined by different considerations from the question of remittal of actions to the former County Courts. *Per* FitzGibbon J.: Under the present procedure presence or absence of visible means does not affect the result. *Connor* v. *O'Brien*
[SUPREME COURT 24

2. PRACTICE—TRANSFER OF ACTION —*Action commenced in High Court—Transfer to Circuit Court—Action of tort—Personal injuries—Damages exceeding* £300—*Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 25 *and* 48.] Plaintiff, a farmer's son, instituted an action in the High Court for assault, and claimed £500 damages. Defendant, who was also a farmer, applied to have the action transferred to the Circuit Court, that Court having jurisdiction in an action for tort when the claim does not exceed £300. In his affidavit in support of the application to transfer, defendant said that he had already been acquitted by a jury on a charge for the assault, and that he only struck the plaintiff in self-defence. In an affidavit resisting the application, a doctor described the plaintiff's injuries, which were of a serious character. *Held* (reversing Murnaghan J.), that the action ought not to be transferred to the Circuit Court, as, having regard to the uncontradicted evidence of the doctor, the Court could not say that a verdict exceeding £300 would be set aside as excessive and unreasonable. *Connor* v. *O'Brien,* [1925] 2 I.R. 24, applied. *Monahan* v. *M'Namara*
[SUPREME COURT 32

3. PRACTICE—TRANSFER OF ACTION —*Transfer from the High Court to the Circuit Court—Writ issued before establishment of Circuit Courts — Courts of Justice Act,* 1924 (*No.* 10 *of* 1924), *sects.* 2 *and* 25.] The writ in an action for assault was issued in January, 1924. A motion in the King's Bench Division to remit the action to the County Court Judge, which was made in March, 1924, was refused. For the purpose of the establishment of the Circuit Courts (except the

PRACTICE—*continued.*
Dublin Circuit), the Courts of Justice Act came into operation on August 6th, 1924. An application by the defendant to the High Court on October 14th, 1924, to have the action transferred for trial to the Circuit Court, then established, was refused by Murnaghan J. *Held* (affirming Murnaghan J.), that as the action could not have been commenced in the Circuit Court at the time it was commenced, there was no jurisdiction to transfer the action for trial to the Circuit Court under sect. 25 of the Courts of Justice Act, 1924. *M'Collum* v. *Tease* ... SUPREME COURT 33

PRACTICE — Appeal from Circuit Court to High Court — Principles applicable to the hearing —Malicious injury award 240
See MALICIOUS INJURY. 1.

PROHIBITION to Judge of Circuit Court—Absence of jurisdiction —Defendants resident in England 165
See JURISDICTION.

PROOF, onus of—Evidence as to first letting of house 42
See LANDLORD AND TENANT—ACTION FOR RENT.

"REINSTATEMENT CONDITION," absence of, from malicious injury award—Amount of compensation limited to "market value" 240
See MALICIOUS INJURY. 1.

REMITTING from High Court to Circuit Court ... 24, 32, 33
See PRACTICE—TRANSFER OF ACTION.

RENT, claim for increased—Whether house within Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—Date of first letting 42
See LANDLORD AND TENANT—ACTION FOR RENT.

RENT PAID—Letting agreement not signed by tenant—Estoppel [157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.

REPEAL of restriction imposed on mortgaging or charging — Holding subject to Land Purchase annuity—Repeal not retrospective 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

RESTRICTION on mortgaging or charging—Holdings subject to Land Purchase annuity — Charge in excess of permitted amount 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

1. REVENUE—CORPORATION PROFITS TAX—*Claim for exemption—Meaning of the expression "company" — Finance Act,* 1920 (10 & 11 *Geo.* 5, *c.* 18), *sect.* 52, *sub-sect.* 3 — *Bank of Ireland—Holders of Stock—Whether members of a corporate body whose liability is limited* — 21 & 22 *Geo.* 3, *c.* 16 (*Ir.*), *sects.* 6, 20, *and* 23.] In Part V of the Finance Act, 1920 (which deals with the Corporation Profits Tax), the expression "company" is defined by sect. 52, sub-sect. 3, to mean "any body corporate so constituted that the liability of its members is limited . . ." The Bank of Ireland, which was established pursuant to the statute of the Irish Parliament, 21 & 22 Geo. 3, c. 16, was assessed to Corporation Profits Tax. On appeal, the Special Commissioners were of opinion that the Bank was not liable, but stated a case for the High Court. *Held* by the High Court, that the liability of the members of the Bank under 21 & 22 Geo. 3, c. 16 (Irish), is unlimited in respect of the debts contracted by it, and accordingly that it is not a "company" as defined by the Finance Act, 1920, sect. 52, sub-sect. 3, and therefore is not liable to Corporation Profits Tax. *Revenue Commissioners* v. *Bank of Ireland* ... ... HIGH COURT 90

2. REVENUE—INCOME TAX—*County Council—Interest of moneys raised by County Council for Rural District Councils and Boards of Guardians—Claim to set off interest paid on loans by Rural District Councils and Boards of Guardians — County Fund — Local Government (Ireland) Act,* 1898, *sect.* 51, *sub-sect.* 1—*Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *First Schedule, Sch. D., Rules applicable to Case III.*] By sect. 51, sub-sect. 1, of the Local Government (Ireland) Act, 1898, the money required to meet the expenses of a Rural District Council

REVENUE—*continued.*

or of a Board of Guardians is to be supplied by the County Council on demand by the District Council or Board; and the County Council is to pay the money so demanded out of the County Fund. If, after money has been raised by a County Council to meet such demands, and while it remains in the hands of their treasurer, interest accrues to them thereon, *held* that their liability to income tax is to be determined solely by the amount of such interest, and no account can be taken of the interest paid by the Rural District Councils or by the Boards of Guardians upon money borrowed by them for purposes within the administrative county. *Phillips* v. *Limerick County Council*

[HIGH COURT 139

3. REVENUE— *Income tax— Deduction—Holder of an office or employment of profit—Expenses incurred and defrayed out of emoluments—Travelling expenses—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule E., r.* 9.] The Income Tax Act, 1918, Schedule E., r. 9, provides:—"If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred or defrayed." Respondent, who was the principal of a National School situated at C., in the County of Clare, could not procure a suitable residence at C. or within a radius of five miles therefrom. He therefore resided at K., about five miles from C. He was not physically strong, and the road from K. to C. is rough and hilly and difficult to cycle. He was therefore obliged to keep a pony and trap, and to employ a man for the purpose of getting from his residence at K. to the National School at C. and back, at an expense of £60 a year, £40 of which he claimed as a deduction. He contended that he was "necessarily obliged to incur and defray out of the emoluments" of his office or employment as principal of the National School the sum of £40 a year as "expenses of travelling in the performance of the duties of the office or employment."

REVENUE—*continued.*
The Special Commissioners, on appeal, were of opinion that the expenditure was not allowable; but, in deference to a previous decision of the County Court Judge of Clare, who allowed a similar claim by the respondent for the previous year, they allowed the appeal. *Held,* on a case stated for the High Court, that the expenses in question were not incurred in the performance of the duties of the office, and that the deduction claimed was not allowable. *Philips* v. *Keane*
[HIGH COURT 48

SALE OF GOODS — CONTRACT CONTAINED IN TELEGRAMS—*No time fixed for delivery — Delivery and payment concurrent conditions — Seller wrongfully refusing to deliver goods — Measure of damages — Difference between contract price and market price at time of refusal to deliver—Absence of available market at place of delivery—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *sects.* 28, 51.] In October, 1923, defendant wired to plaintiffs, who were wool merchants in Dublin, offering them wool, and plaintiffs wired in reply. Further telegrams passed between the parties, which the Court held constituted a binding contract for the sale of the wool at the price mentioned—F.O.R. at Cahirciveen, Co. Kerry. No time was fixed for delivery. The defendant not having delivered the wool, plaintiffs sued for damages. Defendant contended that under sect. 28 of the Sale of Goods Act, 1893, payment and delivery were concurrent conditions, and that as the plaintiffs neither sent a cheque nor tendered cash for the wool, they could not allege a failure to deliver, or that there was a breach of contract. *Held,* that a reasonable time for delivery had elapsed by December 5th, 1923; and, as the wool was not delivered, the defendant must be deemed to have broken his contract. Accordingly, as the defendant was not ready and willing to deliver the wool, though the plaintiffs were ready and willing to pay for it, defendant's contention was unsustainable. Sect. 51 of the Sale of Goods Act, 1893, deals with damages for non-delivery, and sub-sect. 3 provides: "Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if

SALE OF GOODS—*continued.*
no time was fixed, then at the time of the refusal to deliver." The price of wool rose during the months of November and December, 1923. The evidence dealt with the Dublin prices only. *Held,* that as there was no evidence of an available market for the wool at Cahirciveen, where delivery was contracted for, yet, having regard to the previous dealings between the parties and the inter-communication between Cahirciveen and Dublin, the market price at Cahirciveen might, for the purposes of the measure of damages, be taken to be the market price at Dublin, less the cost of carriage. Accordingly the damages were fixed at the difference between the contract price and the market price of the wool in Dublin, less the cost of carriage from Cahirciveen to Dublin, at the time of the defendant's refusal to deliver. *Wertheim* v. *Chicoutimi Pulp Co.,* [1911] A. C. 301, applied. *Macauley and Cullen* v. *Horgan*
[SULLIVAN P. 1

SCIENTER — Cattle unloaded from train — Frightened after railway journey — Escaping into highway—Injury to person on highway—Liability for damage
[110
See NEGLIGENCE. 2.

SEAMAN, ACCIDENT CAUSING DEATH OF—Claim in respect of — Workmen's Compensation Act, 1906—Shipowners resident in England — Jurisdiction of Irish Free State Courts 165
See JURISDICTION.

"STANDARD RENT," determination of — Evidence — Onus of proof 42
See LANDLORD AND TENANT—ACTION FOR RENT.

STATUTORY RULES AND ORDERS—Consolidated Workmen's Compensation (Ir.) Rules, 1917 (Stat. R. & Or., 1917, No. 529), rr. 14, 81, 83
[165
See JURISDICTION.

—— Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (Stat. R. & Or. 1923, No. 405) ... 165
See JURISDICTION.

STATUTORY RULES—*continued.*
—— Provisional Government (Transfer of Functions) Order, 1922 (Stat. R. & Or., 1922, No. 315) [165
See JURISDICTION.

STATUTES—21 & 22 Geo. 3, c. 16 (Ir.), ss. 6, 20, 23 ... 90
See REVENUE. 1.
—— 6 & 7 Wm. 4, c. 116, s. 135 195
See MALICIOUS INJURY. 2.
—— 16 & 17 Vict. c. 38, s. 1 ... 205
See MALICIOUS INJURY. 4.
—— 24 & 25 Vict. c. 97, s. 51 ... 195
See MALICIOUS INJURY. 2.
—— 35 & 36 Vict. c. 94, s. 78 144
See LICENSING ACTS.
—— 37 & 38 Vict. c. 69, ss. 21, 38 [144
See LICENSING ACTS.
—— 44 & 45 Vict. c. 41, s. 23 (3), (4) [246
See MORTGAGE.
—— 44 & 45 Vict. c. 49, s. 58 (7) [157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.
—— 52 & 53 Vict. c. 63, s. 38 (2) (*a*), (*b*), (*c*) 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.
—— 56 & 57 Vict. c. 71, ss. 28, 51 1
See SALE OF GOODS.
—— 61 & 62 Vict. c. 37, s. 5 ... 150
See MALICIOUS INJURY. 3.
—— 61 & 62 Vict. c. 37, s. 5 ... 205
See MALICIOUS INJURY. 4.
—— 61 & 62 Vict. c. 37, s. 5 (1) 195
See MALICIOUS INJURY. 2.
—— 61 & 62 Vict. c. 37, s. 51 (1) 139
See REVENUE. 2.
—— 3 Ed. 7, c. 37, s. 54 (3) ... 51
See LANDLORD AND TENANT—LAND PURCHASE. 2.
—— 6 Ed. 7, c. 47, s. 5 (3) ... 37
See TRADE UNION.
—— 6 Ed. 7, c. 54, s. 11 ... 35
See PRACTICE—APPEAL. 1.
—— 6 & 7 Ed. 7, c. 58, ss. 2, 7, 8, 11, Sch. I, Art. 18, Sch. II, Arts. 11, 18 165
See JURISDICTION.
—— 6 Ed. 7, c. 58, Sch. II, Art. 4 [61
See PRACTICE—APPEAL. 2.

STATUTES—*continued.*
—— 8 & 9 Geo. 5, c. 40, First Sch., Sch. D., Rules applicable to Case III 139
See REVENUE. 2.
—— 8 & 9 Geo. 5, c. 40, Sch. E, Rule 9 48
See REVENUE. 3.
—— 10 & 11 Geo. 5, c. 17, ss. 1, 3, 12 (1), (2), (9) 42
See LANDLORD AND TENANT—ACTION FOR RENT.
—— 10 & 11 Geo. 5, c. 18, s. 52 (3) [90
See REVENUE. 1.
—— 12 Geo. 5, c. 4, s. 1, Sch. Arts. 1, 17, 18 165
See JURISDICTION.
—— 13 Geo. 5, c. 1, s. 1, Sch. ... 165
See JURISDICTION.
—— 13 Geo. 5, c. 2, s. 6 ... 165
See JURISDICTION.
—— No. 1 of 1922, ss. 1, 2, Sch. I, Arts. 2, 12, 64, 65, 66, 73, 75, 83, Sch. II, Arts. 1, 17, 18 [165
See JURISDICTION.
—— No. 2 of 1922, ss. 3, 11 ... 165
See JURISDICTION.
—— No. 15 of 1923, ss. 5, 6 ... 150
See MALICIOUS INJURY. 3.
—— No. 15 of 1923, s. 6 ... 195
See MALICIOUS INJURY. 2.
—— No. 15 of 1923, s. 6 ... 205
See MALICIOUS INJURY. 4.
—— No. 15 of 1923, s. 6, s. 10 (1), (5), (13), (14) 240
See MALICIOUS INJURY. 1.
—— No. 19 of 1923, s. 4 (8) ... 157
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 2.
—— No. 19 of 1923, s. 18 (1) ... 69
See LANDLORD AND TENANT—ACTION TO RECOVER POSSESSION. 1.
—— No. 42 of 1923, ss. 19, 20, 24 (1), 70, 73 (2) 231
See LANDLORD AND TENANT—LAND PURCHASE. 1.
—— No. 10 of 1924, ss. 2, 25 ... 33
See PRACTICE—TRANSFER OF ACTION. 3.
—— No. 10 of 1924, ss. 18, 22, 61 35
See PRACTICE—APPEAL. 1.

STATUTES—*continued.*
—— No. 10 of 1924, ss. 18, 51, 61, 63 [61
See PRACTICE—APPEAL. 2.
—— No. 10 of 1924, ss. 25, 48 ... 32
See PRACTICE—TRANSFER OF ACTION. 2.
—— No. 10 of 1924, ss. 25, 48, 51, 56 [24
See PRACTICE—TRANSFER OF ACTION. 1.
—— No. 10 of 1924, ss. 37, 51 165
See JURISDICTION.
—— No. 10 of 1924, s. 61 ... 150
See MALICIOUS INJURY. 3.
—— No. 10 of 1924, ss. 61, 62 240
See MALICIOUS INJURY. 1.
—— No. 62 of 1924, s. 16, Sch. I [144
See LICENSING ACTS.

SUPREME COURT—Jurisdiction—Appeals—Town Tenants Act, 1906 35
See PRACTICE—APPEAL. 1.
—— —— Workmen's Compensation, Act, 1906 61
See PRACTICE—APPEAL. 2.

THEFT, Cases involving—Malicious injury claims 87, 150, 195, 205
See MALICIOUS INJURY. 2, 3, 4, 5.

THIRD PARTY, act of—Liability for [110
See NEGLIGENCE. 2.

TOWN TENANTS ACT, 1906—Appeal from award of Judge of Circuit Court—Jurisdiction of High Court 35
See PRACTICE—APPEAL. 1.

"TRADE DISPUTE," what constitutes, under Trades Disputes Act, 1906 37
See TRADE UNION.

TRADE UNION—TRADE DISPUTE—WORKMAN ARRESTED BY GOVERNMENT FORCES—*Refusal of employer to reinstate the workman when released—Absence of trade dispute—Picketing of premises—Trades Disputes Act, 1906 (6 Ed. 7, c. 47), sect. 5, sub-s. 3.*] A publican's assistant was arrested by Government Forces and imprisoned by the Executive Government for a period of about twelve months. On his release his union demanded his reinstatement. This demand having been refused, the union withdrew the other assistants, and picketed the premises. The defendant, who was one of the picket, having been arrested and charged before the magistrate, the latter held that there was no "trade dispute" within the meaning of 6 Ed. 7, c. 47, sect. 5, sub-s. 3, and convicted the defendant and fined him ten shillings. On appeal from the conviction by way of case stated: *Held*, that the magistrate was right in his decision. Observations by Lord Loreburn L.C. in *Conway* v. *Wade*, [1909] A.C. 506, applied. *Barton* v. *Harten* K. B. DIV. 37

TRANSFER OF ACTION from High Court to Circuit Court [24, 32, 33
See PRACTICE—TRANSFER OF ACTION.

TREES cut down and carted away—Malicious damage—Claim for Compensation ... 87, 205
See MALICIOUS INJURY. 4, 5.

VENDOR'S LIEN—Transaction not giving rise to—Other security taken—Abandonment of lien [51
See LANDLORD AND TENANT—LAND PURCHASE. 2.

WORKMEN'S COMPENSATION ACT, 1906—Appeal from award of compensation by Judge of Circuit Court—Jurisdiction of High Court ... 61
See PRACTICE—APPEAL. 2.
—— —— —— Jurisdiction of Irish Free State Courts—Employer not domiciled in Irish Free State 165
See JURISDICTION.
—— —— —— Invalidity of Irish Rules thereunder—Jurisdiction of Irish Free State Courts 165
See JURISDICTION.

WOODS cut down and trees carted away—Malicious injury—Claim for compensation 87
See MALICIOUS INJURY. 5.

THE END.

BIBL.
UNIV.